

Panaji, 30th July, 1987 (Sravana 8, 1909)

SERIES II No. 18

OFFICIAL GAZETTE

GOVERNMENT OF GOA

EXTRAORDINARY

GOVERNMENT OF GOA, DAMAN AND DIU

Law Department

Establishment Branch

Office of the Chief Electoral Officer, Goa,
Daman and Diu

Notification

No. 3-2-85/ELEC

The following Notification No. 82/Goa-LA/1-85/86 dated 15-12-1986 issued by the Election Commission of India, New Delhi is hereby published for general information.

M. Raghuchandar, Addl. Chief Electoral Officer.

Panaji, 1st January, 1987.

Election Commission of India

Ashok Road,

New Delhi-110001, dated 15th December, 1986

Notification

No. 82/Goa-LA/1/85/86. — In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the Judgment pronounced on 18-8-1986 by the High Court of Judicature at Bombay, Panaji Bench at Panaji in Election Petition No. 1 of 1985.

By order,

Bahvant Singh

Under Secretary

Election Commission of India.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY PANAJI BENCH (GOA)

Election Petition No. 1/1985

Shri Narayan Shrinivass Fugro,
House No. 112, Parsiwada, Diu.

Versus

1. Shri Shamjibhai Bhika Solanki,
House No. 1512, Choro Mangal,
Ghogla, Diu.2. Shri Mohanlal Kanji Katariya,
House No. 116, Vekaria, Diu.

— Petitioner.

— Repondents.

Shri J. Dias, Advocate for the Petitioner.

Shri V. B. Nadkarni, Advocate for Respondent No. 1.

Shri F. Rebello, Advocate for Respondent No. 2.

Coram: G. D. Kamat, J.

Date: 2nd July, 1985.

ORDER

1. This Order shall dispose of the following issue: —

Whether the petition is not maintainable for want of proper verification of the petition and the supporting affidavit (O. P. R. 1).

2. The above issue arose in the following circumstances:

The petitioner who was a candidate at the general elections to the Legislative Assembly of Goa, Daman Diu from 30-Diu Assembly Constituency having been defeated challenges the election of respondent no. 1, for short returned candidate on the grounds that the returned candidate committed corrupt practices. Apart from seeking a declaration that the election of the returned candidate is void he also seeks an order for a declaration that he has been duly elected from that Constituency. The allegation of corrupt practices as contained in para 5(1) relates to bribery. Paras 5(2) and 5(3) are in relation to corrupt practice of undue influence and para 5(4) relates to other corrupt practices. While verifying this petition it has been however stated by the petitioner that what is contained in these paragraphs 5(1), 5(2), 5(3) and 5(4) is stated on information received and believed to be true. The petition is duly supported by an affidavit of the petitioner sworn before the Court of the Judicial Magistrate F.C. which again mentions that the statements made in paragraphs 5(1), 5(2) and 5(3) in relation to the corrupt practices is true to his information.

3. The returned candidate in his defences filed to the petition has in paragraph 1 raised an objection to the effect that neither the petition nor the Affidavit filed by the petitioner in relation to the averments relating to corrupt practices have been verified in the manner laid down in the Civil Procedure Code, 1908 and the Rules regulating such petitions in as much as the petitioner has failed to mention the sources of information. In the absence of disclosures of sources of information it was urged that the petition is liable to be dismissed at the very threshold and it is in this way that Issue No. 1 was pressed to be heard as a preliminary Issue.

4. According to the learned counsel for the returned candidate the petition is liable to be dismissed on this ground alone as it was clearly mandatory on the part of the petitioner to have disclosed the sources of information as the allegations are of corrupt practices committed by the returned candidate and since the petition and the affidavit do not disclose the sources of information of the petitioner it is fatal to the petition.

5. According to Shri Dias, learned counsel for the petitioner, the petition cannot be dismissed even of this Court

holds that the verification of the petition and the supporting affidavit is defective and at the most this Court can direct the petitioner to file a fresh affidavit and amend the petition. It is further urged that it is only a procedural matter and therefore not fatal and it is further urged that the manner in which the issue is couched even if it is answered in the affirmative, the petition cannot be dismissed and the sole question for deciding that issue is whether the petition is maintainable and if it is not maintainable it cannot be held that it is liable to be dismissed and petitioner can amend the petition and file a fresh affidavit.

6. Section 83 of the Representation of the People Act, 1951 provides: (1) An election petition—

.....
(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof."

Section 94A of the Conduct of Elections Rules, 1961 provides that the affidavit referred to in the proviso to sub-section (1) of Section 83 shall be sworn before a Magistrate of the first class or a notary or a commissioner of oaths and shall be in form 25.

Form 25 provides a proforma of an affidavit that is required to be filed as mentioned in the proviso to Section 83 of the Representation of the People Act, 1951. Insofar as the affidavit filed by the petitioner accompanying the petition is concerned there is no dispute that it is in the prescribed form being Form No. 25 as prescribed pursuant to Rule 94A of the Conduct of Elections Rules, 1961. But then however it must be seen that clause (c) of sub-section (1) of Section 83 provides that the petition shall be verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings. Insofar as the Code of Civil Procedure is concerned Rule 15 of Order VI provides that every pleading shall be verified at the foot by the party to be acquainted with the facts of the case and the party verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true. Order XIX which deals with affidavits in Rule 3 mentions that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted; provided that the grounds thereof are stated. In the present case however in paragraphs (a), (b) and (c) it is mentioned that the corrupt practices alleged in paras 5(1), 5(2) and 5(3) respectively of the petition are true to his information. None of the allegations made relating to corrupt practice are averred to be true to his own knowledge. It is now contended by Shri Nadkarni that trial of a criminal petition being quasi criminal in nature firstly it is necessary for the petitioner who makes allegation of corrupt practice must assume full responsibility and secondly the petitioner must be tied down in the matter of allegation of corrupt practice so that he may not fill in lacunas and that way lead evidence and for this reason it is mandatory on the part of the petitioner to disclose the sources of information upon which allegation of corrupt practice is alleged against a returned candidate. And on consideration of this aspect of the matter if the petition and the affidavit do not disclose sources of information the petition must be dismissed on that score alone and he placed reliance on some authorities of the Supreme Court to which I will presently make a reference.

7. He first placed reliance in the decision of *Virendra Kumar Saklecha v. Jagjiwan and others* reported in A.I.R. 1974 S.C. 1957. In that case the High Court had declared the election of the appellant Saklecha to be void on some corrupt practice committed by him. In the appeal filed by Saklecha before the Supreme Court it was contended on his behalf that the respondent Jagjiwan who had filed the election petition but however had not disclosed the source of his information in the affidavit accompanying that petition and therefore the petition ought to have been dismissed on that score. The Madhya Pradesh High Court had framed its own Rules in respect of Election Petitions and Rule 7 of the Madhya Pradesh High Court Rules provided that every affidavit should clearly express how much is a statement and declaration from knowledge and how much is a statement made

on information and behalf must also state the source or ground of information or belief with sufficient particularity. It further held that though the Form No. 25 of the Conduct of Election Rules required the deponent to an affidavit to set out which statements are true to the knowledge of the deponent and which statements are true to his information there is no requirement of disclosure of this source of information and yet the Supreme Court held that so long as the M. P. High Court Rules are not inconsistent with that Form the affidavits supporting the Election Petition must be in conformity with Rule 7 and therefore there must be a disclosure of the source of information and that way held that the affidavit was fatal. But it must however be seen firstly that this case was decided on the basis of Rule 7 of the M. P. High Court Rules in respect of an Election Petition and secondly this point was canvassed not as a preliminary issue at the trial of the Election Petition. Therefore it is difficult to accept that this authority supports the contention now raised by the learned counsel for the returned candidate. He next relied upon the decision of *Ramanbhai Nanibhai Patel v. Jasyantsingh Udesing Dabhi and others*, reported in A.I.R. 1973 S.C. 1162. In this case the election of Ramabhai was declared to be void by the Gujarat High Court and that is how the said Ramabhai preferred his appeal to the Supreme Court. The attack in the petition was charges of bribery, which according to the Gujarat High Court were held to be proved. Mr. Nadkarni has placed reliance on para 9 of this Report which mentions that the Judges of the Supreme Court said that they are noticing some salient criticism against the judgment of the High Court which shake the foundation of the charge of bribery which were held to be not sustainable. It was observed that the allegations in the Election Petition itself were too vague and indefinite. Further an observation is made that the affidavit in support of the statements of bribery as contained in para 9 were wholly inadequate and wrong as the statements in the affidavit were mentioned to be true to the information of the Election Petitioner which was held to be neither a correct form of an affidavit nor it fulfilled the requirement of disclosing the source of information. With due respect this authority again does not help returned candidate because the point in connection with the defective verification was not decided at the threshold of the petition and it was dealt with subsequently. The verification was held to be defective because the very petitioner who in his affidavit had averred that what was mentioned in the affidavit was true to his information, in his deposition before the High Court he stated that he received this information from one Ramabhai Punjabhai who had filed another Election Petition and this Ramabhai was not even examined as a witness in the Election Petition filed by Jasyantsingh. It is difficult to accept that this authority lays down the law that if disclosure is not made regarding the source of information in the affidavit the petition is liable to be dismissed in limine. Next reliance is placed on the authority of *K. M. Mani etc. v. P. J. Antony and others* reported in A.I.R. 1979 S.C. 234. In this case also the election of K. M. Mani, appellant, was held to be void and that made him file the appeal before the Supreme Court. At his instance a point had been raised that the Election Petition had not been properly verified as it had not been stated which of the averments of the paragraphs 3 to 6 were true according to the information received by the petitioner and which were believed by him to be true. An objection had been taken in the written statement that affidavit filed along with the petition was not in conformity with the requirement of law and what is more; it was canvassed that the petition was liable to be dismissed because of that defective verification and reliance was placed on the authority of *Virendra Kumar Saklecha v. Jagjiwan and others*, A.I.R. 1974 S.C. 1957 (supra). The learned Judges of the Supreme Court held that the Election Petition against K. M. Mani could not have been dismissed on the ground of defective verification of the affidavit as no branch of any rule of the Kerala High Court Rules had been brought to the notice of the Supreme Court. It is however interesting to note that the Supreme Court observed that the decision in Saklecha's case (A.I.R. 1974 S.C. 1957) was based on the Rules of the M.P. High Court and that is how the plea for dismissal of the Election Petition on that ground was negatived.

8. Mr. Nadkarni, learned counsel for the returned candidate has however made reference that this Court has its own Rules relating to Election Petitions and even if it is held that there are no such Rules by virtue of the Notification of the Central Government made under sub-section (1) of Section 13 of the High Court at Bombay (Extension

of Jurisdiction to Goa, Daman and Diu) Act, 1981 all rules and forms relating to procedure and conduct of cases before the Court of the Judicial Commissioner which were in force immediately before the appointed day are adopted to continue in force and to be applicable mutatis mutandis to proceedings before the Bench of the High Court at Bombay insofar as the Panaji Bench is concerned. It is equally true that under the Goa, Daman and Diu Judicial Commissioner's Regulation, 1963 in exercise of the powers conferred by Section 20 rules were made in regard to Election Petitions under the Representation of People Act, 1951. On going through the Judicial Commissioner's Court Rules and the Rules available as framed by the High Court of Judicature at Bombay in regard to Election Petitions under the Representation of People Act, 1951 they are pari passu and there is no difference whatsoever. Neither the one or the other Rules provide unlike Rule 7 and 9 of the M.P. High Court Rules that a deponent is bound to disclose the source of his information. It is therefore clear that the authority of A.I.R. 1974 S.C. page 1957 cannot be held applicable to the present case.

9. Shri Dias, learned counsel for the petitioner has however placed reliance on the authority of *Murarka Radhev Syam Ram Kumar v. 1. Roop Singh Rathore and others*, reported in A.I.R. 1964 S.C. 1545. In this case it has been clearly held that a defect in verification can be cured and that it is not fatal to an Election Petition. It must be further seen that this decision is a decision of a larger Bench and there is nothing shown to me by the learned counsel for the returned candidate that this authority is no longer a good law.

10. Shortly stated the Supreme Court has examined in what cases the petition could be dismissed and in that context reference is made to Section 90 of the Representation of the People Act. Section 90 is today akin to Section 86 of the Representation of People Act, 1951. The Election Tribunal in that case had held that the defect in the verification is not a fatal defect and a fresh affidavit could be permitted to be filed at a later stage if the earlier affidavit had been found to be defective insofar its verification was concerned. The Supreme Court while approving the view of the Tribunal mentions:

"This view of the Election Tribunal was affirmed by the High Court. We agree with the view expressed by the Election Tribunal and we do not think that the defect in the verification due to inexperience of the Oaths Commissioner is such a fatal defect as to require the dismissal of the election petition."

The passage quoted above is at the end of para 13 which deals with that contention. Shri Dias next pointed out another authority of a Single Judge of the Madhya Pradesh High Court in the case of *Bhartendra Singh v. Ramsahai Pandey and others* reported in A.I.R. 1972 M. P. 167. In this case also the learned Single Judge held the defect in the affidavit is not fatal. In that case also the Election Petitioner in his affidavit had mentioned that whatever allegations of corrupt practice made in paragraphs 3, 4, 5 and 6 of his Petition were true to his knowledge and information received and believed to be true. It is not necessary to point out that this type of verification is itself meaningless because no information can be true to his knowledge and to his information at one and the same time as the identical facts cannot be verified both on knowledge and information. As rightly pointed out in the Supreme Court case of A.I.R. 1964 page 1545 it is not possible to hold that merely because the affidavit and the petition did not disclose the source of information of the petitioner that defect is fatal and therefore the petition is liable to be dismissed at the threshold. It was however sought to be contended by Shri Dias that the issue under discussion as couched, the dismissal of the petition cannot be made even if it was found that there is a requirement of giving source of information as according to him this Court could only hold whether the petition is maintainable or not maintainable, but this Court cannot dismiss it even if it comes to hold that the petition is not maintainable. With due respect I am unable to accept this contention for if I am to hold that the petition is not maintainable it would thus mean that the petition is liable to be dismissed because if it is not maintainable it is not maintainable at all and therefore the only order that is possible is the order of dismissal.

11. Shri Dias is otherwise right. Section 86 of the Representation of People Act lays down that the Election Petition is liable to be dismissed if it is not in compliance with Sections 81, 82 and 117. In turn Sections 81, 82 and 117 lay

down conditions, the non-compliance of which entail in the dismissal of the petition at the threshold. Therefore it is clear that the defect in the matter of verification under Section 83 cannot be a ground for dismissing the petition in limine. This view is supported by the authority of A.I.R. 1964 S.C. page 1545.

12. Shri Dias however pleaded that even if this Court finds that the verification of the affidavit is defective and is not in accordance with Order 19, rule 3 of the Code of Civil Procedure, this Court could now direct the petitioner to file a fresh affidavit.

13. Shri Nadkarni however contended that in spite of the point regarding maintainability of this petition having been raised, the petitioner did not try to rectify the defect in the verification earlier and therefore the petitioner is not entitled to any indulgence from the Court allowing the petitioner to now amend the petition or to direct the filing of a fresh affidavit in support of the petition by incorporating the correct verification.

14. Rule 3 of Order 19 of the Civil Procedure Code provides that a deponent of an affidavit must confine to facts of his own knowledge. Since the petitioner has averred corrupt practice against the returned candidate and the facts leading to the corrupt practice is not within the direct knowledge of the petitioner they are said to be received by him on information believed to be true but however he has not given the source of this information. These proceedings being what they are as mentioned earlier and with a view to confine the petitioner to what is alleged against the returned candidate the petitioner can be directed to file a fresh affidavit disclosing the sources of his information so that the returned candidate has an opportunity to test the genuineness and veracity of the source of information on one hand and not to allow the petitioner to make any departure from the sources or grounds and make embellishment to his case. The petitioner can be permitted to file a fresh affidavit disclosing the source of information.

15. There is however another aspect which needs to be considered. The trial in the petition has so far not begun. The verification of pleadings is a matter of procedure. As held in the authority of A.I.R. 1974 S.C. 1957 (supra) source of information is required to be mentioned so as to tie down down a petitioner and not to allow him to introduce embellishment. It is equally laid down in the authority of *Sangram Singh v. Election Tribunal, Kotah and another*, reported in A.I.R. 1955 S.C. 425 that the Code of Civil Procedure is a procedure to facilitate justice and further its ends, not for penalties and punishments and to trip people up. Considering this aspect of the matter amendment of pleadings and/or filing new affidavit cannot be held to cause prejudice to the returned candidate. To advance cause of justice the petitioner ought to be directed to file the necessary affidavit in compliance with the provisions of the Code of Civil Procedure.

16. For the reasons mentioned, the petitioner is directed to file a fresh affidavit disclosing the sources of his information in relation to corrupt practices alleged by him in terms of the Code of Civil Procedure on or before 5th July, 1985. Issue No. 1 is answered as indicated. Order accordingly.

Sd/-
(G. D. Kamat, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY PANAJI BENCH (GOA)

Election Petition No. 1/1985

Shri Narayan Shrinivass Fugro,
resident of House No. 112,
Parsiwada, Diu.

—Petitioner
E. P. No. 1/85

Versus

1. Shri Shamjibhai Bhika Solanki,
Resident of House No. 1512,
Choro Mangal, Goghla, Diu.
151
2. Shri Mohanlal Kanji Katariya,
Resident of House No. 116,
Vekaria, Diu.
18-8-1986
Respondents.

Shri J. Dias, Senior Counsel with Shri G. U. Bhohe, Advocate
for the Petitioner.

Shri D. R. Dhanuka, Senior Counsel with Shri V. B. Nadkarni
and Shri R. M. Bagai Advocates for the Respondent No. 1.

Coram: G. D. Kamat, J.
Date: 18th August, 1986.

JUDGMENT.

1. This election dispute by the petitioner, Shri Narayan Shrinivass Fugro, an independent candidate, challenges the election of Dr. Shamjibhai Bhika Solanki to the Legislative Assembly of Goa, Daman and Diu held in December, 1984 from 30-Diu Assembly Constituency. Dr. Shamjibhai Bhika Solanki, who contested on Congress (I) ticket, for short, the returned candidate polled 6109 votes as against the petitioner who polled 5727 votes. Shri Mohanlal Kanji Katariya, the third candidate in the field impleaded in this petition as respondent no. 2 polled 311 votes, but however he has not taken part in the present proceedings, though initially an appearance was made on his behalf by his counsel, Shri F. Rebello.

2. The general elections to the Legislative Assembly of Goa, Daman and Diu were notified on 20th November, 1984, the last date for making nomination was 27th November, 1984. The names of contesting candidates were declared on 30th November, 1984 and the polling was held on 27th December, 1984. The declaration of results were made on 28th December, 1984 at which the returned candidate was declared to have been duly elected from 30-Diu Assembly Constituency. There were four more candidates contesting these elections, but they withdrew in time, thereby leaving the petitioner and the two respondents in the field.

3. At the outset it be mentioned that though this petition was presented in February, 1985, it is being decided now after nearly 18 months. This petition could not be taken up for day to day hearing once the preliminaries were over as at this Bench no third Judge was available, except for a brief spell of six weeks, as a result I had to sit on a Division Bench on every Monday and more often even on Tuesdays of the week for taking up admissions and disposal of urgent final hearing matters.

4. The petitioner avers in the petition that Dr. Shamjibhai Bhika Solanki, the returned candidate, belongs to the kharwa community which is pre-dominant in that part of Diu Constituency which is known as Ghogla. The 30-Diu Assembly Constituency comprises of Diu island and Ghogla village. The village of Ghogla consists of seven Choras (wards). Every choro has its own patel who is elected by the people of the Choro for a term of one year. That there is a head patel for the entire Ghogla village elected by Ghogla community of all seven Choras and who is elected every year on the day of Holi for a term of one year. This head patel is elected in rotation from each and every Choro as per their turn. Each patel has his own Kotval who is appointed by him and who performs the functions of summoning the members of kharwa community to their meetings and to announce whatever resolutions that are passed by the community. It is further averred that when any resolution is passed by kharwa community and once that resolution is announced by the Kotval all the members of the community are bound by that resolution and if the resolution is flouted by any member thereof, the head Patel excommunicates that member of the community. The consequence of excommunication that are mentioned are that he is not allowed to enter the temple, nor permitted to cremate dead members of his family in the crematorium. He is not sold the daily necessities like fish and vegetables in the local market. An engagement has to be broken if such engagement has taken place prior to excommunication. A priest is not allowed to perform any religious ceremony at the house of the excommunicate and the excommunicate is not even supposed to communicate with other members of the kharwa community for fear that those members of kharwa community would in turn face excommunication for having kept contact with the excommunicate. In the event the excommunicate wants to return to the fold of the community, he has to pay a heavy fine imposed by the head patel varying from Rs. 5000/- to Rs. 15,000/-.

5. Insofar as the present petition is concerned, the petitioner seeks to get a declaration that the election of the returned candidate is void on four corrupt practices. The petitioner does not rest content and seeks a further declaration that he has been duly elected to the 30-Diu Assembly Constituency in place of the returned candidate.

6. The corrupt practice that is spoken to in paragraph 5(1) is that the returned candidate on the evening of 23rd December, 1984 at Vanakbara, Diu, addressed a group of fishermen and promised that if they vote for him at the ensuing elections he would construct sheds for the purpose of storing their mechanised fishing boats each costing Rs. 5000/- and further give a barrel of kerosene costing Rs. 500/- free. In para 5(2) it is alleged that the returned candidate and Hira Bawa, the head patel with the consent

of respondent no. 1 committed corrupt practice of undue influence inasmuch as a meeting was convened at Ram Mandir at 10.30 a.m. at which the returned candidate was present. In the said meeting at the behest of the returned candidate the head patel Hira Bawa moved and the meeting of kharwa community passed a resolution whereby the members of kharwa community were prohibited from voting for the petitioner at that election, except on pain of excommunication and social ostracism. The said resolution was proclaimed by the Kotval, Shri Kantilal Bawa, alias Chinco in all the Choras of Ghogla village and the substance of that resolution is to the effect that nobody should vote for Fugro, and to vote only for Shamjibhai. Nobody should visit Fugro's office nor take part in his processions or meetings, failing which he would be excommunicated according to the resolution of the kharwa community. Para 5(3) of the petition speaks of the corrupt practices committed by the returned candidate for having appealed to the members of kharwa community to vote for him and not to vote for the petitioner on the grounds that the returned candidate is and the petitioner is not a member of the kharwa community. The last of the corrupt practice spoken to in para 5(4) is if the petitioner is not able to satisfy that the aforementioned three corrupt practices were committed by the returned candidate or by said Shri Hira Bawa with his consent, the election of the returned candidate has been materially affected by the said corrupt practices which were committed in the interest of the returned candidate by his agent.

7. In support of the election petition, the petitioner has adduced evidence of himself and that of 14 other witnesses. Documentary evidence is also on record, adduced by the petitioner as well as by the returned candidate including some documents which are styled by the parties as contemporaneous documentary evidence. Insofar as the case of the returned candidate in the written statement is one of simple denial that he has not committed any corrupt practice. But however, in his evidence produced before this Court he has set up an alibi relating to corrupt practice spoken to in para 5(2) and para 5(3) that he was not present at the meeting of the kharwa community held on 29th November, 1984 at 10.30 a.m. at Ram Mandir.

8. The first corrupt practice that is averred and disclosed by the petitioner in the petition in paragraph 5(1) is sought to be supported by the evidence of three witnesses. For the purposes of controversy that exists with regard to the corrupt practice of bribery in relation to the calling of the meeting by the returned candidate on 23rd December, 1984 at Vanakbara wherein the returned candidate is purported to have addressed a group of fishermen and promised them that he would construct sheds for storing their mechanised fishing boats and further give a barrel of kerosene should they vote for him. It may be necessary to make a direct reference to the averments contained in the petition.

9. Paragraph 5(1) in relation to the charge of bribery reads as under:—

"On 23-12-1984 in the evening at Vanakbara respondent No. 1 addressed a group of fishermen and promised that should they vote for him at the ensuing election he would construct sheds costing about Rs. 5000/- each for their mechanised boats and further give a barrel of kerosene costing Rs. 500/- each free."

These are all the allegations made in the petition against the returned candidate.

10. Charges of corrupt practice have been dealt with by the Supreme Court for the last several years in variety of cases. One of the first important case which came before the Supreme Court was in the case of *Mohan Singh v. Bhanwar Lal*, reported in A.I.R. 1964 S.C. page 1366 which lays down:—

"The onus of establishing a corrupt practice is undoubtedly on the person who sets it up, and the onus is not discharged on proof of mere preponderance of probability, as in the trial of a civil suit; the corrupt practice must be established beyond reasonable doubt by evidence which is clear and unambiguous."

11. In *Guruji Shrihari Balram v. Vithalrao*, reported in A.I.R. 1970 S.C., page 1841 it was reported:—

"It is trite to say that the burden of proving everyone of the ingredients of the corrupt practice alleged is on him who alleges it. If he fails to establish any one of them to the satisfaction of the Court he must fail."

In *Mahant Shreeo Nath v. Choudhry Ranbir Singh*, reported in 3 S.C.C., page 647(2), it was again observed:—

"A plea in an election petition that a candidate or his election agent or any person with his consent has

committed a corrupt practice raises a grave charge, proof of which results in disqualification from taking part in elections for six years. The charge in its very nature must be established by clear and cogent evidence by those who seek to prove it. The Court does not hold such a charge proved merely on preponderance of probability: the Court requires that the conduct attributed to the offender is proved by evidence which establishes it beyond reasonable doubt."

Krishna Iyer, J. speaking for the Supreme Court in the decision of *Abdul Hussain v. Shamsul Huda*, reported in A.I.R. 1975 S.C., page 1612 observed:—

"Charges, such as have been imputed here, are viewed as quasi-criminal, carrying other penalties than losing a seat, and strong testimony is needed to subvert a Returning Officer's declaration When elections are challenged on grounds with a criminal taint, the benefit of doubt in testimonial matters belongs to the returned candidate Oral evidence ordinarily is inadequate especially if it is of indifferent quality or orally procurable."

In *Razik Ram v. Jaswant Singh Chouhan*, reported in A.I.R. 1975 S.C., page 667, the Supreme Court held:—

"Before considering as to whether the charges of corrupt practice were established, it is important to remember the standard of proof required in such cases. It is well settled that a charge of corrupt practice is substantially akin to a criminal charge. The commission of a corrupt practice entails serious penal consequences. It not only vitiates the election of the candidate concerned but also disqualifies him from taking part in elections for a considerably long time. Thus, the trial of an election petition being in the nature of an accusation, bearing the indelible stamp of quasi-criminal action, the standard of proof is the same as in a criminal trial. Just as in a criminal case, so in an election petition, the respondent against whom the charge of corrupt practice is levelled, is presumed to be innocent unless proved guilty. A grave and heavy onus therefore rests on the accuser to establish each and every ingredient of the charge by clear, unequivocal and unimpeachable evidence beyond reasonable doubt. It is true that there is no difference between the general rules of evidence in civil and criminal cases, and the definition of "proved" in section 3 of the Evidence Act does not draw a distinction between civil and criminal cases. Nor does this definition insist on perfect proof because absolute certainty amounting to demonstration is rarely to be had in the affairs of life. Nevertheless, the standard of measuring proof prescribed by the definition, is that of a person of prudence and practical good sense. 'Proof' means the effect of the evidence adduced in the case. Judged by the standard of prudent man, in the light of the nature of onus cast by law, the probative effect of evidence in civil and criminal proceedings is markedly different. The same evidence which may be sufficient to regard a fact as proved in a civil suit, may be considered insufficient for a conviction in a criminal action. While in the former a mere preponderance of probability may constitute an adequate basis of decision, in the latter a far higher degree of assurance and judicial certitude is requisite for a conviction. The same is largely true about proof of a charge of corrupt practice, which cannot be established by mere balance of probabilities, and, if, after giving due consideration and effect to the totality of the evidence and circumstances of the case, the mind of the Court is left rocking with reasonable doubt—not being the doubt of a timid, fickle or vacillating mind—as to the veracity of the charge, it must hold the same as not proved."

In the case of *A. Younus Kunju v. R. S. Unni*, reported in A.I.R. 1984 S.C., page 960, while dealing with the charge of corrupt practice, it is held:—

"There is total consensus of judicial opinion that a charge of corrupt practice under the Act has to be proved beyond reasonable doubt and the standard of proof is the same as in a criminal case."

Same is the principle again laid down in the second recent case of *Manmohan Kalia v. Yesh*, reported in A.I.R. 1984 S.C., page 1161:—

"It is now well settled by several authorities of this Court that an allegation of corrupt practice must be proved as strictly as a criminal charge and the principle of preponderance of probabilities would not apply to corrupt practices envisaged by the Act because if this

test is not applied a very serious prejudice would be caused to the elected candidate who may be disqualified for a period of six years from fighting any election, which will adversely affect the electoral process."

12. So there is no point in multiplying authorities and put in a nutshell it could be summarised that the highest Court has laid down firstly that the corrupt practice must be proved as strictly as a criminal charge and that the principle of preponderance of probabilities cannot be applied to corrupt practices and secondly, that the corrupt practice must be established by clear and cogent evidence and further that in testimonial matters the benefit of doubt must belong to the returned candidate, where the oral evidence is inadequate and if it is orally procurable.

13. The first objection raised on behalf of the returned candidate by his learned counsel, Shri B. R. Dhanuka is that this Court ought to dismiss the so called corrupt practice of bribery in limine without even going into the evidence on the ground that the allegations in support of this corrupt practice is vague. It is urged that inasmuch as the corrupt practice alleged is a charge of bribery, it was clearly incumbent upon the petitioner to have given full facts and material particulars to enable the returned candidate the maximum opportunity of answering that charge and of knowing what was exactly the bribery that is sought to be made against him. Referring to the averment in paragraph 5(1) it is mentioned that the petitioner did not plead the place and time where the purported meeting was addressed by the returned candidate where he is supposed to have made the offer of construction of a shed for storing the mechanised fishing boats each costing about Rs. 5000/- and a further promise of a barrel of kerosene costing Rs. 500/- in the event the voters of Vanakbara should vote for him. Highlighting on the necessity of pleading full facts and material particulars, it is mentioned by Shri Dhanuka that the absence of them may lead to fabricating evidence according to the needs and that way go on improving the charge of bribery. For the proposition that this corrupt practice is liable to be dismissed in limine in the absence of place of the alleged meeting being not indicated in the petition, reliance has been placed in the recent authority of *Dandlat Ram Chauhan v. Anand Sharma*, reported in A.I.R. 1984 S.C., page 621. This is an election case based on corrupt practice wherein it has been reported that the allegations must be very strongly and narrowly construed to the very spirit and letter of the law and in order to constitute corrupt practices, the following necessary particulars, statement of facts and essential ingredients must be contained in the pleadings:— (1) Direct and detailed nature of corrupt practice as defined in the Act. (2) Details of every important particular must be stated giving the time, place, names of persons, use of words and expressions, etc. (3) It must clearly appear from the allegations that the corrupt practices alleged were indulged in by (a) the candidate himself (b) his authorised election agent or any other person with his express or implied consent.

14. It is true that in respect of the serious charge of bribery made against the returned candidate all that is mentioned is that the returned candidate addressed a group of fishermen on the evening of 23-12-1984 at Vanakbara where the alleged promise was held out. The place of the meeting is nowhere mentioned nor for that matter the time at which the meeting was so convened, except no doubt that it is mentioned that it was in the evening. The question that therefore arises is whether it was sufficient for the petitioner not to have mentioned the place of the meeting where the alleged offer of bribery was made to the voters and that having not been done could he then be allowed to set up oral evidence to show as to the place where that meeting was so addressed?

15. Before however, I answer these objections on behalf of the returned candidate, one more aspect of the case will have to be looked into. The petitioner made this averment of alleged corrupt practice of bribery and undisputably it is his case that it was not committed by the returned candidate in his presence and the petitioner came to know about it subsequently through some other source. When the petition was served on the returned candidate, an objection was raised in the defence that there is no disclosure of source of information by which the petitioner alleged the aforementioned corrupt practice. On the basis of the pleadings an issue was framed:—

"Whether the petition is not maintainable for want of proper verification of the petition".

and this Issue was tried as a preliminary issue, which was disposed of by hearing arguments by order dated 2nd July,

1985 (Exh. 24). By that order the petitioner was directed to file a fresh affidavit in support of his petition disclosing the source of information with regard to the corrupt practice alleged by him. The petitioner accordingly filed a fresh affidavit dated 4th July, 1985. The affidavit discloses that insofar as the corrupt practice of bribery contained in paragraph 5(1) is concerned, the source of information in relation thereto are Shri Raja Lakshman Solanki (P.W. 2), Shri Nathu Jiva Baraiya (P.W. 3) and Shri Jamnadas Somabhai Soma (P.W. 4), all residents of Vanakbara, Diu. All these three witnesses are unanimous in saying that they not only attended this meeting addressed by the returned candidate, but that they gave the material particulars of this meeting to the petitioner on the day following the meeting and that this meeting was held in the very election office of the returned candidate that had been set up during the time of elections. It is again common ground between the parties and the witnesses that the returned candidate had set up an election office in a regular shop where one Ramji Bhagwan (R.W. 7), another resident of Vanakbara sells items like nuts, bolts, nails, fishing nets and some accessories relating to fishing nets. Although there is some controversy with regard to the size of this shop, the fact remains that the returned candidate had set up his election office insofar as his campaign in Diu island is concerned in that shop. I am highlighting this fact in the very beginning to suggest that whatever it be, being a shop, the place is bound to have limitations with regard to its size and it is in this setting that I will have to appreciate the point raised by the learned counsel for the returned candidate.

16. Now as to the question whether the non-disclosure of the time and place of the meeting is fatal insofar as the petitioner's allegation regarding charge of bribery is concerned in my view the answer to this question will naturally depend upon whether based on the allegations made by the petitioner against the returned candidate the indication of time and place was vital and if answer to this question is in the affirmative, then it will have to be held that the corrupt practice alleged in para 5(1) is liable to be dismissed in limine, for not having pleaded full facts and material particulars of that corrupt practice. Coming back to the averments made in the petition in relation to the corrupt practice of bribery, all that is said is that the returned candidate addressed a group of fishermen on the evening of 23rd December, 1984 at Vanakbara where the so called offer of construction of a shed and further a barrel of kerosene was held out. There is no indication whatsoever as to the place where this meeting was alleged to have been addressed. There is no difficulty in holding that insofar as as the venue of the meeting is concerned it is so vital from the nature of the corrupt practice alleged that it becomes a relevant material particular and that being so, it was clearly incumbent upon the petitioner to have disclosed the venue of that meeting. A somewhat different view could be taken with regard to the non-disclosure by the petitioner about the exact time of the meeting because the petitioner has disclosed that such a meeting was held in the evening. As mentioned earlier, I am supported in the view that I am taking by the authority of *Daulat Ram Chauhan v. Anand Sharma*, reported in A.I.R. 1984 S.C., page 621, where the Supreme Court in dealing with the case of charges of bribery has clearly laid down that to constitute corrupt practices, all necessary particulars, statement of facts and essential ingredients must be stated in the pleadings thereby giving firstly direct and detailed nature of corrupt practice and secondly details of every important particular giving the time, place, names of persons, use of words and expressions, etc.

17. Shri Dias, learned counsel for the petitioner says that inasmuch as the petition disclosed that a meeting was held and it was averred to be a private meeting though publicly held, the non-disclosure of the place or venue of the meeting ought not to be held that important material particular. At the most the returned candidate could have sought better particulars. He further mentions that no grievance is made in the written statement filed by the returned candidate and as long as other details are already mentioned the objection of dismissing the current charge of bribery in limine is uncalled for.

18. At page 111 of Third Edition of Chawla's Book-Elections Law and Practice it is mentioned:—

"On the facts it was held that all the 'material facts' constituting a complete charge of corrupt practice under section 123 (2) against the candidate were stated in the petition. The proximate date of administering the threat which was only a material particular as distinguished

from a material fact was also given. Only the place and precise time of giving the threat were not stated. But these were at best only material particulars, and not "material facts". the occasion for furnishing such particulars would have arisen only if the respondent had asked for them".

Relying on this passage, Shri Dias mentions now that the returned candidate having made no grievance of non-disclosure of the place, there is no question of discarding the corrupt practice at this stage and the Court will have to decide the same on its merits, as no better and further particulars had also been sought.

19. The corrupt practice of bribery having been alleged against the returned candidate to set aside his elections, it is clearly incumbent upon the petitioner to have given full facts and material particulars relating to that corrupt practice. From the facts alleged it is clear that the place where such corrupt practice is alleged to have been committed assumes vital importance because, according to the petitioner, it was done openly and that too in a meeting where the largest community of Vanakbara had been invited without any discrimination. Therefore, clearly the venue or place of the meeting would assume great importance. Once this is the position, it is difficult to discard that this material particular was not required to be disclosed at the earliest in the petition. I have to therefore hold that the objection made by the learned counsel for the returned candidate must be sustained and this corrupt practice is to be discarded and dismissed in limine, for the petitioner cannot be allowed to escape the disclosure of relevant material particulars which is clearly required by virtue of the provisions of Section 83 of the Representation of People Act, 1951.

20. But however, I do not propose to stop here and decide the same on merits.

21. This corrupt practice must fail on another count and it will be advantageous to discuss before I go into further details. It is trite law that when one corrupt practice is pleaded, evidence in respect of another corrupt practice cannot be permitted and such evidence cannot be held against the elected candidate to set aside his election. The averment in relation to the corrupt practice pleaded against the returned candidate is that should the fishermen of Vanakbara vote for him he would construct sheds costing about Rs. 5000/- each for their mechanised boats and further, give a barrel of kerosene costing Rs. 500/- each free. Hence a dual promise was held out by the returned candidate.

However all the three witnesses examined in support of this corrupt practice have unanimously and uniformly stated in their evidence that the returned candidate offered the bribe of construction of sheds for storage of mechanised boats costing about Rs. 5000/- each and a barrel of kerosene of the value of Rs. 500/- each to small boat owners. The evidence therefore is that the first promise is made to one class of fishermen having mechanised boats and the second is to small boat owners who are a separate class of fishermen. This in any event is not the corrupt practice pleaded in the evidence.

22. This apart, now on other merits. The petitioner clearly mentions that whatever the meeting that was addressed by the returned candidate in relation to this charge of bribery, petitioner was not present at that meeting and mentions that he was informed about the meeting by Raja Lakshman, P.W. 2. That too this information was passed to the petitioner when the petitioner by chance happened to come across Raja Lakshman. Raja Lakshman says that four days prior to the day of actual polling there was a meeting convened by respondent No. 1 at Vanakbara where all fishermen were called. He also attended that meeting and that meeting was called at a place called Bunda where returned candidate had his election office. He was at a Chowk and several young persons were going and they mentioned to him that they are going to attend the meeting and that is how he attended that meeting. According to him there were about 50 to 60 people who attended that meeting and they were all Kohlis and Kharwa, being all fishermen. Next it is mentioned that the meeting was first addressed by returned candidate, thereafter by the Patel from Ghogla and two persons from Porbandar. On the next day he says he came across the petitioner and after giving 'ram, ram', on his own told the petitioner as to what happened at the meeting on the earlier day. The petitioner made inquiry as to who were present at the gathering and he was told by Raja Lakshman that one Jiva Nathoo, Nathoo

Jiva and Jamnadas Soma had also attended the said meeting. He further says that the petitioner then asked him to bring these three persons to him and accordingly witness Raja Lakshman took Jiva Nathoo, Nathoo Jiva and Jamnadas Soma to the petitioner. The petitioner questioned them to confirm the story given by Raja Lakshman about the meeting and was satisfied.

23. P. W. 3 Nathoo Jiva Baraiya, a young man of 28 years says that he is a fisherman and his fishing boat was close to the place where the returned candidate had his election office. On seeing the car in which returned candidate came to the election office, he also went there. 50-60 people from Vanakbara had attended the said meeting. According to him the returned candidate first addressed the gathering and said that he also belongs to kharwa community like them and that he had been duly supported and got elected in the earlier general elections held in the year 1980 and he is expecting their support at the ensuing elections also. The returned candidate then outlined the various measures he has taken in the matter of improvement of the place and developments like jetty, lighthouse, subsidy to the fishermen and then the witness mentions about the corrupt practice namely the promise that was held out by the returned candidate to them. It is to this effect that he would provide them a shed for storing their fishing boats of the value of Rs. 5000/- and also offered a barrel of kerosene for owners of small boats. After he spoke it is Hira Bawa, the Patel of Ghogla who spoke. According to him another person from Porbandar was present who also spoke and thereafter the meeting was dispersed. Just as P. W. 2 Raja Lakshman had also mentioned that after the meeting, he went near P. Ws. 3 and 4, similarly this witness P. W. 2 Jiva Nathoo Baraya also gives corroboration to that statement.

24. The last of the witness in the matter of this charge is Jamnadas Soma Solanki. He is again a fisherman of 24 years of age and an elector from the same place Vanakbara. In the evening he came to know about this meeting because some fishermen who were going to that meeting mentioned to him while he was seated as to whether he was not going to attend that meeting and that is how he happened to attend that meeting. He said that there were about 50 to 60 persons present on that occasion and then mentions that once the meeting started it is the returned candidate who addressed them like this: "All of you are fishermen. I am a son of a fisherman. After getting elected as M.L.A. in the last general elections I saw to it that certain development work was started in Vanakbara. If you now give me your vote I will see to it that all works of development are completed. He further promised that if he is voted he would construct sheds of the value of Rs. 5000/- for storing fishing boats and give Rs. 500/- worth of kerosene barrel to each of the owners of the small boats. Nothing else was stated according to this witness. At the end of the meeting P. Ws. 3 and 4 were met by P. W. 2 Raja Lakshman and thereafter they dispersed. Shri Dias, learned counsel for the petitioner is to some extent quite right when he mentions that all these three witnesses, P. W. 2, P. W. 3 and P. W. 4 have given such evidence that taken in a proper perspective there is nothing intrinsically wrong and therefore I should straightaway rely on the same. There are no infirmities in their evidence in relation to the so called meeting addressed by Returned candidate in relation to how that meeting started and ended. The witnesses are therefore trustworthy. There is also nothing on record according to Shri Dias to suggest that these witnesses were out to support the petitioner or that they were out and out to depose against the returned candidate and viewed thus in the context their evidence is reliable. He confesses that there may be some contradictions here and there, but according to him such contradictions cannot make the intrinsic evidence bad or could be termed to be fictitious or got up and lastly the witnesses are not discredited. He points out that two of them have mentioned that there was one mattress, whereas the third has said that there was no mattress on which the speakers who addressed the meeting were seated. These are minor details which do not go about to discard their evidence and insofar as the intrinsic evidence in the matter of meeting and charge of bribery is concerned there is complete unanimity and therefore this corrupt practice according to Shri Dias is driven home and the petitioner ought to succeed in the matter.

25. According to the returned candidate, the story of the meeting at Vanakbara on the evening of 23rd December, 1984 is ex facie fairy-tale and it is only an imagination of the petitioner to somehow see that the election of the returned candidate is declared void. Several points have been

made out to suggest as to how the returned candidate could not have held such a meeting where the purported promise was made to the voters.

26. I will come to each of the points made on behalf of the returned candidate. Before however, I do that I propose to make an observation that it is possible that an incident or meeting of this type is imagined by the election petitioner and it is not difficult to arrange some half a dozen witnesses to speak about a particular meeting arranged to have been held in a small village. For that matter it is also not difficult to fabricate evidence to make the story without discrepancies in relation to the incident so painted. When such make believe incident could be arranged by bringing some witnesses who can speak of such incident, election of the returned candidate could be easily disturbed and set aside. The Courts have therefore to be very cautious in the matter of appreciation of the evidence and cannot go by the evidence that is brought on record and the court will have to take into consideration several aspects and facets and come to the truth of the matter whether in reality such meeting was ever held or such an offer of bribery was ever committed or made. There are plethora of authorities on the subject of appreciation of evidence in election matters which have laid down that the Court in dealing with election petitions should have this caution. It is in this background that I will have to deal with this particular alleged corrupt practice.

27. The returned candidate in his written statement has denied that he ever held any meeting in his election office or anywhere at Vanakbara except one public meeting held on 22nd December, 1984 at Azad Chowk and that too after obtaining the permission from the Civil Administrator, Diu and this meeting was largely attended and even loud speakers had been used at that meeting. It is further the case of the returned candidate that in fact he wanted to have another public meeting at Fudam, Vanakbara on 23rd December, 1984 for which he applied to the Civil Administrator who also happens to be the Returning Officer at this election, but however, permission was declined, on the ground that the venue of that meeting has been already given to another candidate to hold his election meeting. The returned candidate in his deposition has produced a copy of this application together with the reply that he received from the Civil Administrator negating his application for holding his public meeting (Exh R7 Colly.). It is therefore contended by Shri D. R. Dhanuka, learned counsel for the returned candidate that when the returned candidate wanted to hold a public meeting it is improbable he would go for a small meeting inviting only fishermen where he is supposed to have made that promise. This argument by itself will not take the case of the returned candidate any further. It must be fairly conceded that if the candidate was not able to hold a public meeting, therefore he could not have held a small private meeting is hard to be acceptable.

28. There is great force in the other points made by Shri Dhanuka on behalf of the returned candidate.

29. It is common ground between the parties that the real contest at this election was between the petitioner and the returned candidate. The respondent no. 2 was a mere nonentity. The result itself makes it abundantly clear for the respondent no. 2 in fact polled only 311 votes as against the returned candidate who polled 6109 votes and the petitioner polled 5747 votes. It is next pointed out that there is previous history between the parties inasmuch as when the returned candidate had been elected at the general elections held for this very constituency in the year 1980 the petitioner filed an election petition to set aside the result of that election, but however, the petitioner did not succeed. That election petition was dismissed on technical grounds for non-impledment of necessary parties. That case has been reported in A. I. R. 1981 Goa, page 49. It is submitted by Shri Dhanuka, learned counsel for the returned candidate that the returned candidate is always supposed to be on his guard in the background of earlier election having been challenged by the petitioner, the returned candidate would not be such a fool to offer a bribe to the voters in a meeting publicly held like the one sought to be made or painted by the petitioner. It appears that the argument of the returned candidate is to a great extent well founded. It must be seen that whenever a contestant wants to make an offer of a bribe to elicit votes from the members of the public and in the background of the earlier election having been challenged it is not expected of such a contestant to call a meeting of this nature wherein offer of bribe would be made. If in reality the returned candidate wanted to make an offer of a bribe for the purpose of being voted, this sort of offer could have been always made through some persons

other than the contestant himself. It is difficult to accept that the contestant in a meeting of that type would make such an offer to fishermen. As per the petitioner's case the meeting was for the entire fishermen community. It is in evidence that about 90% of the population of Vanakbara is fishermen. Therefore when a meeting is called inviting all fishermen to attend such meeting without discrimination it was a general invitation. Therefore the point for consideration is whether the returned candidate is expected to convene a meeting to make the offer of a bribe, a corrupt practice which if proved would unsettle him in the election. In the background of the case and on facts it is difficult to accept that the returned candidate could have convened such meeting for such purpose.

30. This being one of the improbabilities let us now consider the other aspect of the matter. In the evidence what finally emerges is the offer of a bribe of construction of a shed of the value of Rs. 5000/- for the purpose of storing mechanised boats and a barrel of kerosene for small boat owners. Although in the averments in the petition it was not mentioned that the barrel of kerosene would be given to small boat owners and the impression that was given was a barrel of kerosene to all boat owners, in the evidence it has been restricted only to small boat owners. According to the evidence adduced on behalf of the petitioner it is common ground that whereas two witnesses have mentioned that there are about 100 to 150 fishing boats, the third witness has mentioned that the total number of fishing boats in Vanakbara could be 200. It is therefore contended by Shri Dhanuka, learned counsel that if the returned candidate were to construct sheds by expending a sum of Rs. 5000/- over each shed, he is required to build about 150 to 200 sheds and by giving a barrel of kerosene of the value of Rs. 500/- the total expenditure would be to the tune of over Rupees one million which is hard to believe. He says in a small place like Diu where the total constituency consists of not more than 15000 voters and particularly in an area like Vanakbara which is predominantly fishermen community no politician could be expected to make such a promise which he will not be able to keep. However, Shri Dias, learned counsel for the petitioner has mentioned that what is there for a politician to make an offer of a bribe. It is not that in reality he is to keep that promise. Several promises are made before elections and these promises are never fulfilled. This may be so. But it is difficult to generalise that in a smaller constituency like this such a thing could be practised.

31. There is another facet which makes this incident improbable because it can be expected of a politician contesting any election to make a promise of a thing to come out of Government funds. In the present case it is not the petitioner's case that the returned candidate made a promise that he would try to make some betterment or improve the lot of fishermen with some tangible relief from public funds. But what is suggested is that the returned candidate made the offer of bribe that he would construct sheds by expending money coming out of his pocket and viewed in this context it is difficult to accept that the returned candidate would incur an expenditure of Rupees one million merely to get some votes from these fishermen.

32. There is one more factor which to my mind goes against the petitioner. It is on record that like Goghla there are also patels of the choras or wards of Vanakbara and there is also an institution called the head patel. It is needless to point out that in Diu the practice of electing patels from the wards and head patels are in vogue. This head patel and patels of the ward wield a lot of power including powers of excommunication and power to decide disputes between the members of the community and power even to settle family disputes, matrimonial disputes, etc. Now according to the version of the petitioner the returned candidate, Head Patel of Ghogla and two persons from Porbundar addressed the meeting. All these persons are strangers in Vanakbara. It is nowhere on record that this meeting was organised by any definite person or set of persons from Vanakbara area. It is nowhere the case of the petitioner that any leader of Vanakbara area was sitting on the mattress from where the speeches and offer of bribe had been made. The question therefore that arises in my mind is whether in the matter of offer of a bribe to particular fishermen community would such a meeting be organised by the returned candidate who is admittedly from Goghla in the absence of some luminary of the locality. It is highly improbable therefore that in the absence of either the patel, Sarpanch or Panch or some other person with weight in the locality the returned candidate in the company of some foreign elements foreign to the locality would embark on such corrupt practice.

33. There is yet another way a looking at this and I may straightaway mention that the returned candidate, admittedly

in public life as M.L.A. since the year 1980, if wanted to offer a bribe to the voters, he cannot be expected to have done it by himself. Such things are done behind curtains and through local persons. To accept that it was done so openly is to believe a fairy-tale. Even on this score it is highly improbable that such an offer of bribe or promise had been made by the returned candidate in a meeting of that type.

34. It is in this background that the charge of bribery against the returned candidate will have to be viewed and in this setting the evidence on record be examined. The petitioner has admitted that apart from Raja Lakshman Solanki, Jiva Nathoo Baraiya, Nathoo Jiva and Jamnadas Soma Solanki (page 56 of his evidence) no one else informed him about the meeting of 23rd December, 1984. He also says that it is Raja Lakshman Solanki who volunteered that information to the petitioner when he met him on the morning of the following day and it is at the request of the petitioner to confirm and verify the story of the purported meeting on the earlier evening. It may be firstly seen that it is not that the petitioner came to know about the holding of this meeting from any outside source but it is P.W. 2 Raja Lakshman Solanki who volunteered that information to the petitioner and not that the petitioner asked him in respect of the corrupt practice. This gains some importance from this stand point as to why P. W. 2 Raja Lakshman Solanki at all made or gave such information to the petitioner, unless he has some interest in the petitioner and secondly having volunteered that information as to why the same witness at the instance of the petitioner took Baraiya Jiva Nathoo and Baraiya Nathoo Jiva and Jamnadas Soma to the petitioner. The other aspect is that from these persons there is none from Vanakbara who has spoken to the petitioner in respect of this so called meeting where the promise of construction of the shed for storage of the fishing boat and the offer of a barrel of kerosene had been made. After saying that 90% of the population of Vanakbara are fishermen (page 47 of the evidence) in reply to the question in the cross-examination the petitioner states that the group of fishermen who attended the meeting could be around 10, 15 or 100 and that he is unable to say anything. He also did not ask those four persons as to the number of people that attended the meeting on 23-12-1984 nor they told him about the same. The question that could be tersely put is this. When the petitioner came to know from Raja Lakshman Solanki that a meeting had been organised where a bribe was offered to the voters the petitioner wanted to get confirmation from others for which reason Raja Lakshman brought to him P. W. 3 Jiva Nathoo Baraiya and P. W. 4 Jamnadas Solanki and Baraiya Nathoo Jiva. It is difficult to believe that the petitioner would not ask as to how many persons attended that meeting. It is also difficult to believe that they also did not bother to tell him. It is in the context of this that the question that was put to the petitioner assumes some importance when he was asked as to how many fishermen attended that meeting and all that the petitioner could vaguely answer was may be 10, 15 or 100. According to me this was deliberately done as the petitioner did not want to commit himself to any definite figure and that is how in the deposition of all the three witnesses that followed there is unanimity that between 40-60 people attended that meeting. This in my view casts some doubt on the evidence adduced by the petitioner.

35. But however the myth and the fiction of this purported meeting comes to be exposed when it comes to the venue of the meeting. It is no doubt spoken by P. Ws. 2, 3 and 4 that the meeting was held in the election office of the returned candidate. Now it is common ground that election offices are set up by candidates and they last till the elections are over. Admittedly, the election office, the venue of the meeting which had never been mentioned in the petition is a regular shop. It is to be noted that in the cross examination of the witnesses of the petitioner supporting this corrupt practice that area of that shop cannot be held to be sufficient to accommodate 40 to 60 persons, therefore naturally the witnesses had to say and admit that all were not seated for want of space and some had to remain outside. It is difficult to accept that fishermen, being the majority community of Vanakbara specifically called to attend a meeting organised in a small shop. One can understand if the petitioner had said that only leaders of mechanised boats were called and were offered this bribe. But it is not so. This being the position it is difficult to accept that this type of meeting could have been held in an election office. This however is not all. The evidence insofar as P.W. 2 Raja Lakshman Solanki, P.W. 3 Baraiya Jiva Nathoo and P. W. 4 Jamnadas Soma Solanki is also mutually conflicting inasmuch as P.W. 2 Raja Lakshman at pages 93 and 94 of the evidence says that the people who attended the

meeting were inside the office and were squatted. The returned candidate was seated on a mattress along with other guests and no member of the audience was sitting on the mattress. The mattress was about 2 metres in length and 1 m. in breadth, but he however says that he is not able to say as to how many mattresses of the type could be contained in that shop where the meeting was held. According to him he is also not able to say as to how many persons could have occupied that mattress if they were to sit on it not even by approximation. Nor by approximation he is able to say as to how many mattresses of that type could be contained in that room where the meeting was held. In other words the evidence of P. W. 2 on the matter of the size of the room is not forthcoming. P. W. 3 Nathoo Jiva Baraiya also was very reluctant to give the size of the room where the meeting was supposed to have been held by the returned candidate. For example, he says he is not able to say the area of that room where the meeting was held. At some insistence finally he came out that the election office of the returned candidate would be approximately 22 ft. in length and about 12 ft. in breadth. He however denied the suggestion that the room was 10.8 ft. \times 7 ft. When asked as to the dimension, length and breadth of the court room this witness said that even by approximation he is not able to say. P. W. 4 Jamnadas Soma Solanki although was not able to give the length and the breadth of the election office of the returned candidate, he gave more or less indication of the size by pointing out the length and breadth in the Court itself and from that I made a note in the evidence at page 157 that the size could be about 5m. \times 3m. This witness further says that the election office of the returned candidate was absolutely vacant on the day of the meeting, except for some chairs. But he is certain that there were no mattresses.

36. According to P. W. 2 Raja Lakshman and P. W. 3 Jiva Nathu Baraiya the meeting was addressed and corrupt practice held out by the returned candidate and other speakers by occupying a mattress but however the presence of the mattress is totally denied by P. W. 4 Jamnadas Soma Solanki. Apart from this contradiction Jiva Nathu Baraiya says that only one person out of two from Porbandar addressed the gathering, whereas Raja Lakshman and Jamnadas Soma Solanki say that both persons from Porbandar addressed the gathering. This becomes another inconsistency. Similarly, Raja Lakshman does not make reference to the preferatory speech of the returned candidate which is being spoken to by the other two witnesses. This oral testimony therefore cast a great shadow on the so called meeting.

37. It is equally important to note that P. W. 2 Raja Lakshman mentions that apart from P. W. 3 Jiva Nathu Baraiya, P. W. 4 Jamnadas Soma Solanki and Nathu Jiva there were three more persons who attended the meeting who are known to him and they are Bhika Shankar, Ramji Bhagwan and Ramji Mandan however he did not disclose to the petitioner the presence of these later three persons. When asked in cross-examination as to why he did not disclose these three names to the petitioner, witness Raja Lakshman mentions that the petitioner did not ask him about them. This again leaves the matter to a grave doubt. The disclosure of Jiva Nathu Baraiya, Jamnadas Soma Solanki and Nathu Jiva had to be at the instance of the petitioner or their presence was found to be convenient for the purposes of eventually making them witnesses to support the charge of bribery.

38. I have already observed earlier that were it not for some interest P. W. 2 Raja Lakshman had in the petitioner, he would not have volunteered information of the so called meeting of the earlier day to the petitioner and further volunteered to get the aforesaid three persons to the petitioner to talk about the meeting on the evening of the same day. Therefore, in my view it is not difficult to hold that witness P. W. 3 Jiva Nathu Baraiya and P. W. 4 Jamnadas Soma Solanki are under the influence of said Raja Lakshman or else, they are, equally interested in the petitioner. This testimony is got up evidence.

39. All this discussion is on the issue no. 2 framed in the petition: Whether the petitioner proves the corrupt practice pleaded in Para 5(1) of the petition. Having regard to all the reasonings and conclusions made above and having regard to the improbability of the meeting being held and considering the oral evidence which is tainted and not worthy of credence and further considering that the meeting as alleged could not have been held at the election office at Bundar, Diu, in my opinion the petitioner has failed to prove the corrupt practice alleged. I therefore hold that the petitioner has failed to establish by cogent and unassailable evidence that the returned candidate held a meeting at 6.00 p.m.

or on the evening of 23-12-1984 at Vanakbara in the election office set up by him. Once I hold that no meeting was held by the returned candidate, the question of he having committed any corrupt practice of bribery cannot arise and the issue is therefore answered against the petitioner and in the negative.

40. The petition next alleges the corrupt practice of undue influence under para 5(2) which reads:—

"That respondent no. 1 and Hira Bawa Ratro with respondent no. 1's consent committed the corrupt practice of undue influence to wit: On 29-11-84 at about 10.30 a.m. a meeting of Kharwa community was convened by the head patel, Shri Hira Bawa at Ram Mandir in Goghla village. The respondent no. 1 was present at the said meeting. At the said meeting at the request of respondent no. 1 the head patel moved and the meeting passed a resolution whereby the members of kharwa community were prohibited from voting for the petitioner at the ensuing elections on pain of excommunication and social ostracism. The substance of the said resolution proclaimed by the Kotval Shri Kantilal Bawa alias Chinoo in Gujarati in all the choras was follows: Nobody should vote for Fugro. All should vote only for Shamjibhai. Nobody should visit Fugro's office nor take part in his processions or meetings failing which he would be excommunicated according to the resolution of the kharwa community."

On these very set of facts by which the purported resolution emerges in para 5(3) the corrupt practice spoken to is that of an appeal to the members of kharwa community to vote and not to vote on the grounds of caste and community. That corrupt practice reads as follows:—

"That respondent no. 1 and one Hira Bawa with the consent of respondent no. 1 committed the corrupt practice mentioned in section 123(3) of the Representation of People Act 1951 which in the meeting of the kharwa community held at Ram Mandir in Ghogla village on 29-11-84 at about 10.30 a.m. respondent no. 1 and Shri Hira Bawa, head patel with consent of respondent no. 1 appealed to the members of the kharwa community to vote for respondent no. 1 and not to vote for the petitioner at the ensuing elections on the ground that the respondent no. 1 was and the petitioner was not a member of the kharwa community."

From the above averments it is clear that one and same set of facts have been bifurcated by the petitioner to plead two corrupt practices: (1) undue influence, (2) an appeal to vote for him and not to vote for petitioner on grounds of caste and community. Insofar as these two corrupt practices are concerned undisputably the facts and evidence relating to both of them are common. It is therefore convenient to take them together for all purposes.

41. First of all it is advantageous for the purposes of understanding as to what these meetings of kharwa community are so that the background is known. The petitioner has alleged that the village of Ghogla has 5307 voters and out of them more than 4500 voters belong to kharwa community, but however it must be held that this averment is not proved. The fact remains that the returned candidate has admitted that the population of kharwas in the village of Ghogla is at least 60%. Ghogla is contiguous to the State of Gujarat and the island of Diu is a distinct part. Both together make what is ordinarily called Diu being territory of the Union Territory of Diu, connected with Goa and Daman. The village of Ghogla is divided into Seven choras and they are Mittabawa, Sikoter, Lakaparmar, Khireshwar, Vacharadev, Chanchan and Mangal. Every chora has its own patel who is elected every year. On the day of Holi the head patel of the entire village comprising of all the seven choras are elected and the election of the head patel is by turn from each and every chora in rotation. The head patel thereafter appoints his own kotval who has got some specific duties of summoning the kharwas to the meetings and pronouncing resolutions made at the meetings of the community at all choras. The returned candidate has pleaded ignorance of various practices and customs of the community. Finally from the evidence on record and preponderance of all the facts it is clear that the Ghogla community periodically holds its meetings in a temple known as Ram Mandir. The regular meetings of the kharwa community are held on each 'Ekadasi' i.e. 11th day of the month and on the 'Amavasiya' New Moon day presided by the head patel. Apart from this a special meeting for the community is convened by the head patel whenever any problem is required to be decided by the community. All that head patel has to do for convening the special meeting other than the 'Ekadasi' and 'Amavasiya' meetings is to make the kotval

announce in all the choras that a meeting is being convened at such time on such day. It is equally proved that no member of the kharwa community of Goghla village can marry a girl outside the community or outside Goghla village or else that person is fined. Every engagement amongst the members of the community is recorded in the Book maintained by the head patel. The head patel has power to adjudicate on disputes between the members in the matter of division and partition of the properties and to intervene in all other disputes. If an award is given by the head patel and if the same is not acceded to by a member of the kharwa community, such member is excommunicated. The effects of excommunication and the consequences are that the person once excommunicated is boycotted by the other members of his community. For that matter he cannot enter the temple. He cannot take part in the community meetings. He is not permitted to cremate the dead bodies of the relatives in the crematorium. Excommunicates are not sold daily necessities by local merchants. In the event engagement has taken place and subsequently there is an excommunication, the engagement is broken up. The priests are not permitted to enter the house of excommunicates to perform religious ceremonies or rites. In short, the person excommunicated is socially ostracised. Each and every patel maintains books and they are ordinarily called registers during their tenure of office. Whatever resolutions passed by the kharwa community are recorded in the book. Similarly excommunications are also recorded in the book. Insofar as the coram for a meeting of the community is concerned, it is in evidence that no sooner about 40 to 60 members of the kharwa community are gathered the meeting would start. All the persons who attend that meeting record their signatures in the Book.

42. It is an admitted fact that Shri Hira Bawa Ratro had been elected as the head patel of the community for the year 1983-84 and he also continued to be the head patel for 1984-85. The reason as to why Hira Bawa Ratro continued to be head patel for the subsequent year although normally it is the turn to elect another head patel from a different chora need no mention here as that subject is irrelevant. One Kntilal Bawa, alias, Chinoo had been the kotval for the year 1984-85 appointed by the head patel Hira Bawa Ratro.

43. Before however we come to the analysis and appreciation of the evidence some more background be mentioned which transpires from the evidence. The kharwa community of Goghla is mainly fisherfolk and undisputably the returned candidate Dr. Shamjibhai Solanki had been the first Graduate in Medicine from the whole of the community of Goghla village. Hence the returned candidate is holding the unique distinction of being the first Doctor in the community. Undoubtedly the election held in December, 1984 was a straight fight between the petitioner and the returned candidate, the second respondent Mohanbhai Kanji being nowhere in the picture. According to both the parties the returned candidate had been the formidable opponent of the petitioner and vice versa. Another facet that may be recorded is in the earlier general election held in the year 1980 this very returned candidate had been declared elected from the same 30-Diu Assembly Constituency. Soon thereafter that election was challenged by the petitioner and in that the challenge was similar to the challenge now made viz. resolution by the kharwa community not to vote for petitioner and vote only for returned candidate and appeal on the basis of caste. I have mentioned all these facts so that there is proper setting for the appreciation of the present election dispute.

44. There is yet more and it is this. The petitioner had successively got elected from 30-Diu Assembly Constituency at the general elections held in the years 1967, 1972 and 1977. As a result the petitioner had been Member of Legislative Assembly of Goa, Daman and Diu from 1967 till he was dislodged by the returned candidate at the general elections held in the year 1980. The result of the general elections of 1967, 1972, 1977, 1980 and lastly of 1984 are brought on record. From these results it is clear that the petitioner had never been able to make any dent, leave alone of substantial nature, in the village of Goghla. In the 1980 elections the petitioner polled in all 160 votes out of over 5000 votes cast at the elections in Goghla. It is not possible to know as to what number of votes the petitioner polled from the polling booths set up in Goghla village at 1972 and 1977 general elections because the practice and rules then prevailing were different as all the votes were got mixed up and then counted. The result of 1967 elections which was like 1980 and 1984 counting boothwise, the petitioner had barely polled 238 votes from the village of Goghla as against one Ratilal Bamaniya, who polled 1283 votes. Therefore it is clear that the strength of the petitioner lies in the island

of Diu. From 1967 right from the time the petitioner had been getting elected till unseated in 1980 election his showing in Goghla is poor. In the last election the petitioner polled 558 votes from Goghla, whereas returned candidate polled 3108 votes. From this it must be held that the village of Goghla never supported the candidature of the petitioner in any manner and this appears to be his chronic weakness. Though the petitioner has finally lost the last general elections to the returned candidate by a margin of only 382 votes it is clear that the petitioner had always been very strongly placed within the island of Diu and the returned candidate from the last two results could be said to be very strongly placed in the village of Goghla.

45. It is mentioned and not without justification by the returned candidate that the village of Goghla being contiguous to the State of Gujarat on three sides, the voting pattern in Gujarat State was bound to have its impact in Goghla. At the last general election in Gujarat State, the Congress-I party had done remarkably well. Out of 26 Parliamentary seats Congress-I got 25. 401 of the M.L.As. of the Legislative Assembly of Gujarat come from Congress-I party out of 527. It is therefore pointed out that the Congress-I wave in the country in general and State of Gujarat in particular could not make Goghla village to be an exception. This wave naturally has helped the returned candidate at the last general elections.

46. As a classic example the returned candidate mentions in his evidence that Shri Xantaram Naik from Goa elected as a Member of Parliament on Congress-I ticket from Panaji, North Goa Constituency which includes Diu as one of its segments polled 3196 votes from Goghla although he himself polled 3108 votes despite the fact that Shri Naik is not known in Diu and despite the fact that he visited Goghla just for a day in his entire election campaign. Besides, being a stranger in Diu, it is pointed out that Shri Xantaram Naik does not belong to kharwa community.

47. On the basis of the corrupt practices alleged in paragraph 5(2) and 5(3) issues No. 3 and 4 have been cast which read thus:

"3. Whether the petitioner proves that the respondent no. 1 and Hira Bawa with the consent of respondent no. 1 committed corrupt practice of undue influence as alleged in para (2) of para 5; and

4. Whether the respondent no. 1 and said Hira Bawa with the consent of said respondent no. 1 committed corrupt practice under section 123(3) as alleged in para (3) of para 5".

48. In answer to the corrupt practices alleged, the Returned candidate makes a simple denial. He has denied that any meeting was held in Ram Mandir by the head patel Hira Bawa Ratro or that he ever attended any such meeting. There is however one difference and it must be stated at once that though there was mere denial in the written statement yet in his oral evidence the returned candidate suggested by way of an alibi that he was not present in Goghla on the morning and forenoon of 29-11-1984 as he was at that time at Vanakbara of Diu island. It has come in his evidence that there was in fact a meeting at Ram Mandir on the forenoon of 29-11-1984, though not of kharwa community for the purposes of deciding a labour problem. It is mentioned that lady workers from kharwa community were made to go in deep waters for the purpose of throwing stones into the sea or for carrying baskets full of fish from the fishing trawlers to the jetty and that too at late hours and therefore a prohibition was thought necessary.

49. Insofar as these corrupt practices are concerned the evidence adduced on behalf of the petitioner can be conveniently bifurcated in two sets. First set of witnesses alleged to have attended the purported meeting of the kharwa community at 11.00 a.m. at Ram Mandir held on 29th November, 1984 and they are P.W.5 Babu Sakar Chauhan, P.W.9 Pradip Devji Kumar Kamaliya, P.W.10 Hira Lakshman Solanki, P.W.11 Bimji Devji Chauhan, P.W.12 Harilal alias Amrit Lal Manji Solanki and the other set of persons who heard Kotval either making the announcement convening the meeting on the morning of that day in different choras and the persons who have not only heard that announcement but those who heard the pronouncement of the Kotval made on the same evening announcing in Choras that earlier in the day of kharwa community having met at Ram Mandir passed a resolution to the effect that nobody should vote for Fugro (the petitioner); that everybody should vote only for Shamjibhai

Solanki (the returned candidate); that no member of kharwa community should take part in the processions or go to the office of the petitioner or in any manner work for him and that if anybody flouts this resolution he would be excommunicated. The persons who either heard the announcement or the pronouncement of the resolution or both who are examined in this case are P.W. 6 Harilal Bijal Chauhan, P.W. 7 Smt. Laximibai Ratilal, P.W. 8 Lalji Bawa Baraiya, P.W. 13 Ram Nathoo Chauhan, P.W. 14 Sakar Nathoo Botio and lastly P.W. 15 Lalji Manji Solanki. This is so far oral evidence is concerned.

50. Now in respect of the documentary evidence, reliance has been placed on some contemporaneous documentary evidence and that consists of a complaint/representation made to the Civil Administrator, Diu and a complaint to the Police Officer in charge of Diu Police Station on the morning of 30th November, 1984. Shortly stated this complaint speaks of the kharwa community meeting held on the earlier day and passing of the resolution appealing to the members of that community to vote for returned candidate and not to vote for petitioner on the grounds of caste. Next is also a complaint and representation made by Ram Nathoo Chauhan, P.W. 13 addressed to the Civil Administrator and that too by annexing five affidavits of different persons. In his representation Ram Nathoo Chauhan, P.W. 13 speaks of electoral offences being committed by his community that too in the name of caste and community thereby prohibiting kharwas from voting a candidate of their choice and according to their conscience.

51. Next is another set of affidavits of five persons to show how certain members of the kharwa community having worked for the petitioner as his polling agents or for some reason connected with election were held to be violators of the resolution of 29-11-84 and were excommunicated soon after the election results were out.

52. Before any comment can be made on this documentary evidence it will be advantageous to see what oral evidence has been led by the petitioner. As mentioned earlier in support of the corrupt practices alleged of undue influence and appeal to the voters in the name of caste & community the petitioner has adduced evidence of himself and that of additional 11 witnesses. The evidence of these witnesses is voluminous and it runs into about 800 typed pages. I propose to extract the evidence of the petitioner's witnesses with regard to the corrupt practices insofar as the main incidents are concerned with a view not to make the judgment unnecessarily exhaustive because I am aware that an exhaustive judgment is many a time an exhausting one.

53. Insofar as the petitioner's evidence is concerned viz. examined as P.W. 1 that evidence is hearsay evidence, but however the petitioner opens up the scenario for this corrupt practice by saying that he heard rumours that there was a meeting held by kharwa community at 11.00 a.m. at Ram Mandir on 29th November, 1984 and wherein a resolution was passed prohibiting members of kharwa community not to vote for the petitioner and only vote for the returned candidate, the latter being a member of kharwa community and should anyone disobey the resolution he would be excommunicated. He then mentions that on seeing one Ram Nathoo Chauhan, P.W. 13 asked him about the meeting and who confirmed about the same to him. He further got confirmation from two more witnesses Babu Sakar Chauhan, P.W. 5 and Bimji Devji Chauhan, P.W. 11 who also similarly confirmed about the matter.

54. Coming to the oral evidence of corrupt practice of undue influence and appeal to the voters on the grounds of caste and community, it must be seen that that evidence consists of two sets. First one is that of persons or members of kharwa community who attended the purported meeting of the community at Ram Mandir on 29th November, 1984 and the second is of the persons who either heard the announcement made by Kotwal Chinoo about the convening of the meeting and those who heard the kotwal making the pronouncement of the resolution passed by the kharwa community at various choras in the evening of the same day. P.W. 5 Babu Sakar, P.W. 9 Pradip Devji Kamaliya, P.W. 10 Hira Lakshman Solanki, P.W. 11 Bimji Devji Chauhan and P.W. 12 Harilal alias Amritlal Manji Solanki are the persons who attended according to them the said meeting.

55. Babu Sakar Chauhan, a Seaman, admittedly a member of the kharwa community who is resident of Sikoter Choro of Goghla village in his evidence mentions that although he does not know as to who called the meeting of 29th November, 1984, he attended that meeting along with about 150 to 200 people belonging to kharwa community and

he saw the returned candidate at that meeting. This meeting was attended besides the returned candidate, by the head patel, the Sarpanch, Aghewans of the various choras. After generally speaking as to how head patel is elected, what the functions of patels are and what are their powers he also speaks of excommunication that is ordered by the head patel. According to him once the meeting was called to order kotwal requested people to observe silence. The respondent no. 1 addressed the meeting and said that in the earlier general elections the community had resolved to support and similarly now they should resolve to get him elected in the ensuing elections. He then says that the returned candidate in his speech after referring to his major opponent (the petitioner) in the election said that he is the son of the community, whereas the petitioner is not a member of kharwa community nor comes from the village of Goghla. Listing his achievements during his tenure as M.L.A. he said how he got the roads constructed as also schools, brought down the prices of beer from Rs. 30/- to Rs. 10/- per bottle and referred to other developmental works. He also said that Rawal dam water has to be made available to the villagers, a bridge has to be constructed on the lines of one existing at Morvi for the benefit of the community at large and several other development works have to be undertaken. He therefore solicited that everybody should vote for him. He next mentioned that he is going to write a resolution which resolution be passed by the kharwa community and that is how the returned candidate sat down and started writing on a paper. At this time the head patel started addressing the gathering and endorsed whatever the returned candidate had mentioned earlier. By that time the resolution written by returned candidate on a piece of paper was handed over to the head patel which was read aloud by the head patel and then this resolution was passed by the kharwa community. The resolution read according to this witness as follows:—

"That nobody should take part in the processions and meetings to be held by Fugro. Nobody should vote for Fugro and on the contrary all should vote for Sham-jibhai (respondent no. 1/returned candidate); that Sham-jibhai is the son of a member of kharwa community and further Fugro does not belong to the community; that nobody should go to the office of Fugro. If anybody is found to disobey this directive he would be excommunicated".

After this resolution was read out the same was repeated with force by the head patel. The same paper was thereafter signed by ex-head patel then patel Pancha Govind followed by Aghewans of the community. The kotwal was thereafter directed to obtain the signatures of every person present at the gathering. By the time kotwal was taking signatures of the persons Pancha Govind addressed the gathering and repeated almost what the head patel Hira Bawa had stated earlier. Thereafter he says one *Rasik Mandan Bedi* spoke, who had been a Government servant at that time. After the meeting was over according to this witness he came across Bimji Devji P.W. 11 and both of them went to a restaurant nearby to have a cup of tea where they met Rambhai Nathoo Chauhan P.W. 13. There was a talk between them at this restaurant whereby the information relating to the meeting and what happened at the meeting was divulged to this Rambhai. He then says that Rambhai asked them as to why no objection had been raised by him as something illegal has been done by the kharwa community and further mentioned that similar resolution had been made by the kharwa community sometime prior to the general elections of 1980 and that the pages of this resolution were subsequently torn off from the book of resolutions as the election petition had been then filed. After this talk it is the case of this witness that they dispersed and on the evening at about 5 to 6 p.m. he heard kotwal making the announcement at the choro that a resolution had already been passed on the morning of that day by the kharwa community at Ram Mandir. He then refers to the incident of the next day on 30th November, 1984 at about 12 noon he was having tea at a cart shop at Bundar in Diu where he saw Bimji Devji with vegetables. He invited him for a cup of tea and when both of them were having tea the aforementioned Rambhai Nathoo suddenly joined them. On checking that there is no person around Rambhai told him and Bimji Devji that the petitioner wants to talk to them for 2 minutes and that is how the present witness and Bimji Devji agreed to talk to the petitioner on the subject of the earlier day's meeting of the kharwa community and accordingly they proceeded. In front of the office of the petitioner they met near and electric pole and told him as to what transpired at the meeting on the earlier day at Ram Mandir. He then

says that he has been excommunicated and that such announcement was made on 2nd January, 1985 soon after the election.

56. As far as P.W.9 Pradip Devji Kamaliya is concerned he is an employee of the Directorate of Health Services who works at Diu as an Insecticide Sprayer. According to him there was a meeting of the kharwa community on 29th November, 1984 and announcement was made on the morning of that day. He attended that meeting and that meeting was attended by Hira Bawa, the head patel, the returned candidate, Pancha Govind ex-patel, Lalji Pancha, Lakshman Lala, and one Rasikbhai. According to him in his address the respondent no. 1 who spoke first mentioned that the elections have come near and he is one of the candidate at that election and all the people who have gathered have to vote for him; that he has done a lot and he is yet to do a lot; that roads have been constructed; schools have been started in Goghla village and prices of beer also have been brought down; that development works have already been carried out and further projects are to be undertaken; a bridge has to be constructed; drinking water is to be made available from Raval dam and cemeteries are required to be built and therefore people should get him elected. Accordingly he also mentioned that the people of Goghla got him elected at the last general elections by passing resolution and in the same fashion they should now elect him by passing similar resolution in that behalf. Then he mentions that the returned candidate said that he is going to write the resolution and accordingly he sat down and started writing down the resolution. The people who gathered at the meeting applauded by clapping. The kotval then announced that the head patel would address the gathering and in the meantime the returned candidate handed over the piece of paper on which the resolution was written. That resolution read that nobody should vote for Fugro. Fugro is not the son of kharwa community nor hailing from Goghla village and therefore everyone should vote only for Shamjibhai. According to him he also mentioned that head patel is going to be his proposer on the nomination paper to be filled for contesting the election. After reading the resolution aloud Hira Bawa Ratro signed the same, followed by ex-patel Pancha Govind; returned candidate also signed followed by other Aghewans and then the kotval was directed to take signatures of the persons present at the said meeting at the foot of that written resolution. That in the meantime Hira Bawa Ratro head patel addressed the gathering and said that nobody should vote for Narayan Fugro; everybody should vote for Shamjibhai; he also threatened that if anybody voted for Narayan Fugro he would be killed (mari Makayama aveshi); kotval thereafter announced the ex-patel Pancha Govind is going to address the gathering and after Pancha Govind addressed the gathering who repeated more or less what the head patel had said the gathering was addressed by one Rasik Bedi. The head patel thereafter obtained confirmation from kotval that people present had signed the paper wherein that resolution was written and the meeting was declared to be closed.

57. Next is Hira Lakshman Solanki P. W. 10 who is a retired Seaman and who is today in the business of transport of rickshaw mentions in his evidence that there was a meeting of kharwa community on 29-11-1984. He heard the kotval at about 10 a. m. making the announcement of the said meeting. When he heard this announcement he was cleaning his rickshaw and having heard the kotval he made a query to the kotval as to what is the purpose for which that meeting had been convened to which the kotval replied that the meeting is in connection with election of returned candidate. He attended that meeting at which there were about 200 people belonging to kharwa community. In his narration about the meeting he says that at first the head patel called upon kotval to declare that the meeting is about to start and that the people should maintain silence. Thereafter the returned candidate got up and started addressing the people that elections are fast approaching and that he is going to contest the same. He also mentioned that kharwa community had already got him elected five years earlier as M. L. A. by passing a resolution and that they should act in a similar way now so that he is again elected as their M.L.A. by passing a similar resolution. Then he refers to the returned candidate having mentioned as to how he had brought down the price of beer from Rs. 20/- to Rs. 10/- and got constructed roads, I.T.I. schools, building a jetty and after referring to other development work a lot more is still to be done; then reference to the drinking water being made available from Rawal dam, a Morvi type bridge to be constructed and he therefore pleaded that kharwa community should pass a resolution to get him elected. At the end of his speech members present at Ram Mandir clapped and

once the returned candidate sat down the head patel started addressing the gathering. In the meantime the returned candidate wrote a resolution, handed over the paper to the head patel who read aloud the resolution. The head patel thereafter read out the resolution to the effect "that everybody has to vote for Shamjibhai; that nobody should vote for Narayanbhai; he is not from our village nor he belongs to our community; if any member of kharwa community is found to have gone to his office or taking part at his meetings or processions taken out by him such member would be treated as an offender of the community and would be excommunicated." The resolution was signed by the head patel and thereafter by the ex-patel Pancha Govind followed by the returned candidate, other Aghewans and thereafter kotval was directed to take the signatures of all those persons present at the meeting and by the time the kotval was moving with the paper collecting the signatures of other members of the community Pancha Govind spoke followed by Rasik Bedi. He then speaks about the excommunication and the effects and consequences of the same and he speaks of hearing the pronouncement made by the kotval on the evening of the same day and that the aforementioned resolution has been passed on the earlier part of the day by the kharwa community and he heard this when he was at the house of the head patel Hira Bawa Ratro when he had gone to see him at about 6 p. m. He then says that he has been excommunicated in the month of May 1985 and an announcement to that effect was made by the kotval on 7th May, 1985.

58. According to Bimji Devji Chauhan P.W. 11, he was in bogla when the last general elections were held and at about 10 a. m. on 29th November, 1984 when he was near Kireswar Choro he heard kotval making the announcement for the convening of the meeting which he attended. When he reached Ram Mandir there were already people gathered and among them were the head patel Hira Bawa Ratro, the returned candidate, Pancha Govind, Sarpanch Babu alias Vira Ranchod, Rasik Mandan alias Bedi, several Aghewans of the village and very many members of the kharwa community and people were still gathering according to him. He says that: Having seen that the people have gathered the head patel told the people that they should listen to two words that are going to be spoken by the returned candidate. The returned candidate thereafter started speaking and in his address to the gathering mentioned that the elections are coming closeby and this time he is also going to contest as a candidate; that he belongs to their community and that Narayan Fugro the petitioner is also contesting the elections; that he is a son of the community and belongs to the same village, whereas the petitioner is not a member of the community nor belongs to the village and he therefore sought the support from all his brothers and sisters to get him elected at the ensuing elections. He also mentioned that he was elected at the last general elections held in the year 1980. Similarly they should pass a resolution and get him elected in a similar manner by passing a similar resolution this time also. Then he started listing out the works which have benefitted the village for the last five years during his tenure as M.L.A. and he made a reference to the construction of schools, starting of I.T.I. schools, roads and bringing the price of beer down and referred that still more works are to be undertaken; that water is to be made available from Rawal dam, swinging bridge is to be constructed like the Morvi bridge and to carry out all these development works no requires their cooperation. He then said that he is now going to sit down and write the necessary resolution which he did, at which the members of kharwa community gave him a loud applause by clapping. Thereafter the head patel Hira Bawa Ratro after making the kotval to tell the people to calm down started speaking and in his address he mentioned that all of you have now heard Shamjibhai and that he fully supports him. He also said that it is a matter of great pride for the kharwa community that a person like the returned candidate should belong to our village and after referring to the petitioner mentioned that he is not a member of the kharwa community. He pleaded for support to the returned candidate and he also mentioned that nobody should take part or assist in the election of Fugro nor participate in his meetings and processions taken out by him in furtherance of his election prospects and campaign and any person doing otherwise would be an offender of the kharwa community and accordingly excommunicated. He also mentioned that when returned candidate filed his nomination papers he is going to countersign that form as a proposer and give him support on behalf of the community. In the meantime the returned candidate completed his writing and handed over the paper to the head patel which was read aloud by the head patel and that was the resolution which stated:—"everybody

should vote for Shamjibhai only; nobody should vote for Fugro; that he does not belong to our village nor is member of kharwa community; Shamjibhai is son of kharwa community and belongs to our village; that no one should go for assisting in the election campaign of Fugro nor participate in the meetings nor in his processions. If anybody does so he will be offender of the community and excommunicated". Then he signed below the resolution written on the paper which was followed by ex-patel Pancha Govind, returned candidate and other Aghewans. The same was thereafter ordered to be circulated to the audience for obtaining the signatures. In the meantime ex-patel Pancha Govind started addressing the gathered and in his speech mentioned that the people have already heard Shamjibhai and Hira Bawa Ratro and he also supports the candidature of returned candidate that nobody should vote for Narayan Fugro nor attend his office, nor take part in the meetings and processions and if anybody defied the resolution he would be excommunicated. After him one Rasik Mandan Solanki rose to speak. This witness thereafter lists as to how head patel is elected and what are his powers, duties of the kotval and to complete his story he says after the meeting was over he came out of the Mandir and came across Babu Sakar, P.W. 5 and both of them went to a restaurant nearby to have tea where they met Rambhai Nathoo who already seated. The story of the meeting was repeated to Rambhai Nathoo at which Rambhai mentioned to them that such a thing is illegal and that he was surprised because kharwa community had already passed a resolution that no politics should be discussed at the community meeting after the last general elections were held in the year 1980. According to him Rambhai Nathoo also mentioned that something must be done about this matter.

59. Referring to 30-11-84 he says after purchase of vegetables at Diu at Bundar he came across Babu Sakar (P.W. 5) and when they were having tea at a cart shop were accosted by Rambhai Nathoo who told them that the petitioner would like to speak to them and whether they mind meeting him. He alongwith Babu Sakar (P.W. 5) agreed to meet the petitioner and accompanied Rambhai Nathoo and all three of them went to meet the petitioner by going towards his office side. They met the petitioner in front of his office near an electric pole and gave him the details as to what happened at the meeting of the kharwa community on the earlier day.

60. P.W. 12 Harilal alias, Amritlal Manji Solanki mentions that he heard the kotval making the announcement in Vacharadev choro about the meeting to be held at Ram Mandir on that day. At 5 minutes to 11.00 he reached Ram Mandir and he saw the head patel calling upon the kotval to announce that people should maintain silence and that returned candidate is going to address the gathering. According to him the returned candidate thereafter got up, folded his hands and mentioned to the audience that if he has committed any mistake the past he should be pardoned. He further mentioned that this meeting has been convened because of the ensuing elections and he said that: "I am the son of kharwa community and belong to your village. Narayan Fugro is not the son of kharwa community nor belongs to your village. In the last elections he opposed me and this time also he is opposing me". Then speaking about his achievements he said that he has established I.T.I. schools, made roads, brought down the price of beer and lot of work has already been done by him and lot more work is still remaining to be done for the betterment of Goghla village. He also mentioned that a swinging bridge like the one found at Morvi must be constructed; water must be made available from Rawal dam and some further development works are still to be completed. He then appealed that the manner in which the people of Goghla got him elected by passing a resolution at the general elections held in 1980 the same must be repeated this time also. He then mentioned that he is going to write down the resolution which should be passed by the kharwa community. He says that there was a big applause after which the returned candidate sat down, started writing the resolution; that in the meantime Hira Bawa, head patel, started addressing the gathering and more or less said like this: "That all of you have heard respondent no. 1. I fully support him. He is the son of kharwa community, and belongs to our village. Narayan Fugro is neither the son of kharwa community nor belongs to our village and no one should work for him at these elections; no one should attend his meetings and if anybody should go to his office or participate in the processions held by him or if anybody is found to assist him in any manner it will be considered as an offence against the kharwa community and that person would be excommunicated. Therefore all of you should vote for

Shamjibhai". He also mentioned that he was going to file the nomination papers of the nominee candidate as his proposer. By this time the returned candidate handed over the paper to Ratro containing the resolution. Head patel Hira Bawa Ratro took the paper in his hand and mentioned to the audience that this is the resolution which is written in the hand of returned candidate and he showed it to the audience and he mentioned that he is going to read the resolution which should be heard by everybody. That resolution read thus: "All votes must go to Shamjibhai only; nobody should vote for Narayan Fugro. Fugro is not the son of kharwa community nor belongs to our village. No one should take part in the processions and meetings nor go to the office of Fugro. If anybody found doing so would commit an offence of the kharwa community and would be excommunicated." On completion of reading of the resolution it is Hira Bawa Ratro who stated that a voter is supposed to put signature or thumb impression on the counterfoil of the ballot paper and therefore it is possible to know who has voted whom and since the returned candidate is already in Government he is in a position to know who has voted whom. He put his signature on the piece of paper on which the resolution was written followed by ex-patel Pancha Govind, headmaster, followed by returned candidate and other Aghewans. After Aghewans finished signing the paper the kotval was directed to take signatures of the persons present. Thereafter ex-patel Pancha Govind addressed the gathering and in his speech he said that people must vote for the returned candidate, as he is going to deliver the goods to this place when elected. He also mentioned that all of them are meeting in a Mandir and by keeping God as witness everybody should put his signature on the resolution and he must see that returned candidate is elected as he is a member of our own community. He sat down, followed by the next speaker Rasik Madan. He says that after the end of the meeting as he was coming out head patel Hira Bawa called him and mentioned to him that all of them must work to get the returned candidate elected. In the meantime he says the returned candidate came near him and mentioned to him that he must support him in these elections as he has treated his mother and made her alright from her ailment. The witness says that he also assured the returned candidate and further told him not to worry about and that he would be fully supported by him in the elections. This is the oral evidence supporting the petitioner's case about the meeting by the persons who attended at 11 a.m. at Ram Mandir on 29th November, 1984.

61. The other set of evidence to which I now come are the persons who did not attend the meeting at Ram Mandir but who heard the announcement of the meeting and or the pronouncement of the resolution made after the meeting and they are P.W. 6 Harilal Bijal, P.W. 7 Smt. Lakshmiben Ratilal, P.W. 13 Ram Nathoo Chauhan, P.W. 14 Sakar Nathoo Botio, P.W. 15 Lalji Manji Solanki.

62. In his evidence Harilal Bijal Bamania P.W. 6 mentioned that he is a Primary School Teacher being a Government employee and a member of kharwa community residing at Cumbervada which falls in Kireswar Choro. He says that on 29th November, 1984 at about 6 p.m. when he was going to the house of his mother-in-law at Chanchan choro, he heard the kotval Kantilal Chinoo saying that head patel has made him to announce that kharwa community has passed a resolution that no member of kharwa community should vote for Fugro as he does not belong to kharwa community nor is a member of the same nor he is hailing from Goghla village. Further no member of kharwa community should take part in the procession or in the meetings held by the petitioner in furtherance of his election prospects and if anybody is found to flout that resolution he will have to face the excommunication. Smt. Lakshmiben Ratilal Ambina who calls herself to be a resident of Goghla from Sikoter choro, P.W. 7 in her evidence mentioned that at about 6 p.m. on 29-11-1984 in her choro the kotval made a pronouncement in connection with the ensuing elections that no member of the kharwa community should vote for Fugro, that all should vote for respondent no. 1/returned candidate and no person shall either go to the office of the petitioner or take part in his meetings or participate in processions and even if anybody is found to act to the contrary would face excommunication for they would be treated as offenders of kharwa community. The kotval who made the announcement is one Kantilal Pawa alias Chinoo. She then speaks about the functions and duties of the kotval, the power of the head patel, etc. She says that she came to know that the meeting was held on the morning of that day because there was an announcement made by the kotval that meeting had been convened at Ram Mandir and that announcement had been to this effect: "That all young and old brothers of kharwa

community are cordially invited at the meeting to be held at Ram Mandir at 9 a.m. to 9.30 a.m." She then lists the effects of the excommunication and says that she has been excommunicated.

63. The next witness is Lalji Bawa Baraiya, P.W. 8. He comes from Lakaparmar choro of Goghla village and admits that he had been Aghewan of his choro for the last about 5 years. According to him on 29th November, 1984 a meeting was convened at Ram Mandir at Goghla at which the returned candidate and others were present. He came to know of the convening of this meeting because kotval had made the announcement on that day. He admits that he did not attend that meeting at Ram Mandir but he came to know as to what happened at that meeting because of the announcement made by the kotval on the evening of the same day. He resides very close to the choro where the kotval makes the announcement and according to him the announcement made in the evening by the kotval ran to this effect: "Everybody has to vote for Shamjibhai. Nobody should vote for Narayan Fugro. Nobody should go to the office of the petitioner nor take part in the processions organised by the petitioner nor attend the meeting to be held by him. Anybody who goes to his office or who takes part in his meetings or processions or votes for him would be an offender of the kharwa community and he would be excommunicated."

64. Ram Nathoo Chauhan, P.W. 13 is the next witness who speaks about how Bimji Devji and Babu Sakar P.W. 11 and P.W. 5 respectively met him at the restaurant at about 12 to 12.30 at Goghla and after greeting him, they told him what had happened or transpired at the meeting of kharwa community at Ram Mandir. He narrates the details of the talk he had with these two persons as to the holding of the meeting and how surprised he was that kharwa community having resolved not to discuss politics in the meeting again did so. He also asked them whether they lodged any protest to which they said 'No' for they could not raise any protest as they would be singled out by the community. Then he went home, had his food and took rest. At about 6 p.m. he heard the pronouncement made by the kotval at Patel choro and this happened as he was going for a stroll. He heard the kotval saying that a resolution has been made by the kharwa community to the effect that "everybody should vote for returned candidate and none should vote for Narayan Fugro. Nobody should attend the meetings of Narayan Fugro nor join in his processions nor should go to his office and if anybody is found to do so would be excommunicated. He says after hearing this announcement he proceeded further and when he reached Sikoter choro he came across Smt. Kamlaben who was standing close to her house and asked him whether the elections have already come near to which he answered "Yes" and even mentioned that there has been announcement made by the kotval. In the meantime, according to him Lakshmiben Ratilal P.W. 7 came and confirmed that she has already heard the announcement made by the kotval. He proceeded further and by the time he reached Lakaparmar choro he came across Lalji Bawa who on greeting him asked whether he had heard the announcement made by the kotval to whom he said that he had heard it at Patel choro. He says that he has been excommunicated by the patel of the community in the year 1983 in connection with an incident of assault on him with a knife on his forehead on one night; that he had filed a complaint to the Police in respect of this incident and when the returned candidate approached him and desired that he should withdraw that complaint, on his refusal he was excommunicated by the head patel Hira Bawa Ratro as his request was also similarly turned down for withdrawal of the complaint from the police. At a place called Zhapa where he had tea he heard some other people talking in the restaurant criticising the resolution passed by the kharwa community. He then mentions that as he was returning to his house when he reached Mithabawa choro he came across Smt. Sonaben. By that time a thought had occurred to him that something highly objectionable has taken place from the hands of kharwa community in making such resolution and therefore he should take some advice. He went to Diu and contacted one Advocate B.M. Rawal. He talked to Advocate Rawal about the passage of the resolution by the kharwa community as narrated to him by Bimji Devji and Babu Sakar and how that resolution was got pronounced by the kotval in all the choras of Goghla. Advocate Rawal told that a lone person like him cannot take up such type of matter and he should get some more people to speak about the same. He however told him to contact him on the following day at 8 a.m. with other persons. Once he met Sonaben, he told her about what Advocate Rawal had told him and he persuaded Smt. Sonaben. He then went to the house of Purshottam

Somvar. This Purshottam Somvar also agreed to come to Advocate Rawal. Then he went to one Himmat, but Himmat was not available. He went to the house of one Kishore Kamaliya who agreed to come to Advocate Rawal on the following day. He then met one Lalji Bawa Vania alias Baraiya who also agreed to go to Advocate Rawal on the next day. He came back to the house of Kamlaben where he met Kamlaben as well as Lakshmiben Ratilal and he explained to them his mission and between the two it was agreed that Kamlaben should come with him to Advocate Rawal on the following day and that it how on the following day he took them all to the office of Advocate Rawal. Individually each and everyone talked with Advocate Rawal. A representation was made for them to sign and affidavits of these five persons namely Smt. Sonaben, Purshottam Somvar, Kishore, Lalji Bawa and Kamlaben were got prepared by Advocate B. M. Rawal. They were duly got sworn before the Mamlatdar-cum-Executive Magistrate, Diu. The representation got made was handed over in the office of the Civil Administrator as Civil Administrator himself was not present in his office at that time. He (witness) says that he thereafter went to the police station and handed over a copy of that representation to the police station who also interviewed and asked him whether he was present at the meeting of kharwa community to which he replied in the negative. He further mentioned to him that Bimji Devji and Babu Sakar had attended the meeting but he had personally heard the announcement made by the kotval. Thereafter he went for tea. When he was having tea the petitioner on seeing him called him out of the restaurant and inquired as to whether there was any meeting of the kharwa community on the earlier day at Ram Mandir at Goghla to which the witness said 'Yes' and he narrated to him as to what happened as told to him by Bimji Devji and Babu Sakar. Once his narration was complete the petitioner sought from him whether he could get Bimji Devji and Babu Sakar to meet him and that is how on the evening of the same day when he came across Bimji Devji and Babu Sakar who were having tea near the cart shop, had a talk with them and got them to the petitioner; that both of them satisfied the petitioner that there was in fact a meeting which they had themselves attended. He also said that the petitioner asked him whether he would be able to arrange some polling agents and he had agreed to arrange polling agents or at least to get some polling agents for him and according he even got the forms for polling agents or appointment of polling agents. He contacted Bimji Devji, Babu Sakar, Lalji Bawa Baraiya, who agreed to be the polling agents and accordingly handed over the forms to them.

65. The next witness of the petitioner is Sakarbhaj Nathoo Solanki, P.W. 14. In his evidence apart from several things that he has said, on the main aspect of the corrupt practice, he says that at about 9 a.m. on 29-11-1984 at Vacharadev choro as he was proceeding towards bazaar he heard the announcement made by Kantilal Chinoo, the kotval that an urgent meeting of the community is being convened at Ram Mandir. At about 6 p.m. on the same day the kotval again made a pronouncement of the resolution that was passed by the kharwa community at the meeting held earlier in the day. The kotval announced that no member of the kharwa community should vote for Fugro; nobody go to his office nor participate in the processions or meetings held by him or organised by him. If anybody found doing so shall be considered an offender of the community and accordingly shall be excommunicated.

66. The last of the witnesses on this subject is Lalji Manji Solanki, P.W. 15. In his evidence he says that at about 9 a.m. on 29th November, 1984 he heard Kotval making an announcement of the meeting of the kharwa community at Ram Mandir; that in the evening at about 6 to 6.30 p.m. he again heard kotval making the pronouncement of the resolution that nobody should vote for the petitioner; that everybody should vote for the returned candidate and that no one should go to the office of the petitioner or take part in the meeting or processions organised by or on behalf of the petitioner and if anybody does so he will be treated as offender of the community and will be excommunicated.

67. After having seen as to what the witnesses of the petitioner in their oral evidence spoke to about the intrinsic evidence of the meeting of the kharwa community at which the purported resolution was passed, for the purposes of meeting the petitioner's case and answering the criticism of the returned candidate I may usefully mention the evidence relating to an incident that took place at Goghla and at Diu on 30th June, 1983. In fact that incident has given rise to a Sessions case and it is common ground that it is pending

disposal by a Sessions Judge. Undisputably returned candidate, Hira Bawa Ratro the head patel, several Aghewans and scores of people are accused in that case and it is needless to mention that several witnesses of the petitioner are found to be prosecution witnesses in that case. Since that case is pending before the Sessions Judge, it is my desire to make a restricted reference to it, such a matter being sub judice. It appears that in respect of teasing of a girl who is sister of Smt. Lakshmiben Ratilal Ambina (P.W. 7) by one Naglo who is supposed to have been engaged to be married to the daughter of elder brother of the returned candidate some assault took place between said Naglo and the younger brother of P.W. 7 Lakshmiben Ratilal, but however the J.M.F.C., Diu released him on bail. It appears that there were some complaints against the said Magistrate and the kharwa community was agitated over the incident including grant of bail by the Magistrate. A big morcha of the villagers of Goghla was taken to Diu before the Office of the Civil Administrator for demanding transfer of the said Magistrate. It is common ground that once the morcha was organised at Goghla there was arson, some houses were burnt, several houses were damaged and once the morcha happened to be at Diu there was stone throwing on the business premises of the petitioner, a hut belonging to Sakar Nathoo Botio (P.W. 14) and recently constructed house of P.W. 5 Babu Sakar Chauhan were also damaged. Undisputably the returned candidate was also in this morcha and he has admitted this position besides having met the Civil Administrator in connection with the demand for transfer of the Magistrate. It has been mentioned that as a result of this incident leading to the damage and destruction of the houses several families had to be provided shelter at Diu and for that purpose the Government had to open a relief camp. Two persons are alleged to have been killed, one being the brother of Sakar Nathoo Botio (P.W. 14). This incident also left quite an amount of apprehension in the minds of people and it has come in evidence that from that day onwards some families affected by the riots of 30th June, 1983 have become settlers in Diu. A little later we may see that even some of the petitioner's witnesses were the so called victims of those riots. As a result of this incident there have been some excommunications, that is at least what some of the petitioner's witnesses have deposed.

68. Before going into the analysis of the oral evidence adduced by the petitioner the aspect of reliance to be placed on it as contended by counsel for the petitioner and the criticism of this evidence by the learned counsel for the returned candidate let me first come to the contemporaneous documentary evidence that is produced on behalf of the petitioner. While dealing with this subject, I would like to discuss the same in detail considering how far it is reliable insofar as the petitioner's case is concerned as also the criticism of the same including unreliability as advanced on behalf of the returned candidate. The petitioner has produced vide Exh. P-4 a representation that he made to the Returning Officer, 30-Diu Assembly Constituency, Diu dated 30th November, 1984. Copies of this representation were endorsed to the District Magistrate, Diu, to the Chief Electoral Officer and Chief Secretary, Goa, Daman and Diu, Panaji, Additional Chief Electoral Officer and Law Secretary, Panaji, Goa, Inspector General of Police, Panaji, Goa, The Police Inspector, Diu. In that it is contended that the petitioner has reliably learnt that the resolution is passed in Goghla by kharwa community on 29-11-84 at Ram Mandir in the presence of M.L.A. Shri Shamjibhai Solanki (returned candidate) who is also contesting the ensuing elections for the Assembly seat. It further mentions that a resolution was transmitted by the patel of the community named Hira Bawa Ratro through kotval named Kantilal Bawa alias Chinoo in all choras by shouting the same in all choras and thus communicating the same to the kharwa community. That representation further mentions that the wording communicated by the kotval to be: "Nobody should vote for Fugro, they should vote only for Shamjibhai. Nobody should visit Fugro's office nor they should take in the processions or in the meetings of Fugro, failing which a person would be excommunicated according to the resolution of 'Gnati'."

It further mentions that action of patel and kotval are against the spirit of the Representation of People Act 1951 and that people say that voters are likely to be influenced by this mental coercion by the resolution of the 'Gnati' and such election of undue influence and coercion amounts to interference with the free exercise of an electoral right. The representation further speaks that is also learnt that Hira Bawa the patel of community has also socially boycotted the Mohamedan community and Kohli community to bring pressure upon them to vote for their kharwa candidate, Dr.

Shamjibhai Solanki and that this sort of social ostracism will prejudicially and adversely affect the fair and impartial election and therefore the same must be viewed seriously. The request in the said representation says that in the interest of fair election patel and kotval must be called and the undue influence already created should be wiped off by making them transmit a message on all choras of Goghla that people are free to give their vote as they like treating the resolution to be void and that this transmission must be done in the presence of police and if possible in the presence of Civil Administrator in the best interest of fair election.

69. According to Shri Dias the kharwa community having held the meeting on the morning of 29th November, 1984 at which the purported resolution was made and the petitioner having come to know of it got it confirmed from P.W. 13 Ram Nathoo Chauhan, Babu Sakar Chauhan and Bimji Devji Chauhan promptly lodged this representation before the Civil Administrator-cum-Returning Officer and this being a contemporaneous record of the happening of the previous day this document is above suspicion and it therefore proves the veracity that such an incident must have taken place on the earlier day and therefore this representation (Exh. P-4) cannot be brushed aside by the Court and further be relied upon the same for the purpose of the petitioner's averment in relation to the corrupt practice of undue influence and appeal to the voters on grounds of caste and community.

70. Shri Dhanuka, learned counsel for the returned candidate firstly objects to this document being looked into as according to him the petitioner cannot be permitted to rely upon this representation dated 30th November, 1984 as not having been duly proved. According to him what is produced by the petitioner is a carbon copy of that representation and the same was taken on record by the court and marked as Exh. P-4 on an express undertaking by the petitioner that he would seek summons to the Returning Officer to produce the original of this representation in the Court. Despite this, the petitioner did not seek any summons and therefore this secondary evidence cannot be admitted. It is true that speaking about this representation the petitioner in his evidence said that he is producing the carbon copy of the same and he would however seek a summons to the Returning Officer to produce the original in this Court later. He however identified his signature at page 2 of that representation and without any objection thereto on the side of the returned candidate the same is taken on record and marked Exh. P-4. It is equally true that the petitioner did not take any steps to obtain summons to the Returning Officer to produce the original of that representation till this date, but however the fact remains that the carbon copy of the representation was taken on record and marked Exh. P-4 by the Court and since no objection was forthcoming to have it marked as Exh. X to be proved subsequently, I do not think it is proper at this stage to deny whatever benefit the petitioner might get out of this. I will therefore consider it as a proved document because there is also material on record that pursuant to this representation the head patel Hira Bawa Ratro was summoned by the Civil Administrator and even head patel offered his explanation and for that matter denied several things mentioned therein. Referring to this Exh. P-4 Mr. Dhanuka now says that the so called contemporaneous document belies the very case of the petitioner on several counts and therefore the evidentiary value normally given to contemporaneous record cannot be made available to this record (Exh. P-4). The criticism of Mr. Dhanuka in this behalf is not without substance. Take for instance what was mentioned in the petition with regard to this corrupt practice that on 29-11-84 at about 10.30 a.m. a meeting of kharwa community was convened by the head patel Shri Hira Bawa at Ram Mandir in Goghla village and that returned candidate was present at the said meeting; that at the said meeting at the request of the returned candidate the head patel moved and the meeting passed a resolution whereby the members of the kharwa community were prohibited from voting for the petitioner and further that at the said meeting the returned candidate and Shri Hira Bawa the head patel with the consent of the former appealed to the members of kharwa community to vote for the returned candidate and not to vote for the petitioner at the ensuing elections on the ground that the returned candidate was and the petitioner was not a member of kharwa community. Insofar as the oral evidence is concerned, all the witnesses who have attended that meeting, P.W. 5, P.W. 9, P.W. 10, P.W. 11 and P.W. 12 uniformly state that it is the returned candidate who addressed the kharwas first on that day followed by head patel Hira Bawa, Pancha Govind and Rasik Mandan Bedi. Equally unanimously they also say that it is the returned candidate who wrote the resolution in his own handwriting on a piece of paper and that piece of paper

on which the resolution was written was handed over to Hira Bawa Ratro who read aloud the same and got it approved. Considering the averments made in the petition and the oral evidence adduced by the petitioner and comparing it with this representation dated 30th November, 1984 (Exh. - P - 4) there is such a divergence on the main aspects of the corrupt practice that it is difficult to accept where lies the truth. I will succinctly show what the glaring disparities are. Although it is the petitioner's case that returned candidate addressed the members of kharwa community no sooner the meeting was declared open at Ram Mandir at 11 a. m. on 29th November, 1984, it is the returned candidate who spoke first and mentioned that a resolution must be passed by the kharwa community on the lines resolution was passed in a meeting of the kharwa community held prior to the general elections held in the year 1980. After completing his speech he sat down saying that he is going to write the resolution and thereafter wrote the resolution in his own handwriting and handed it over to the head patel. There is no whisper of this matter either in the representation dated 30th November, 1984 or in the petition. In the petition it is mentioned that the head patel moved and the meeting passed a resolution at the request of the returned candidate and that Hira Bawa Ratro appealed to the members of kharwa community to vote for returned candidate and not to vote for the petitioner with the consent of returned candidate, whereas the representation (Exh. P - 4) is totally silent on this point. The only reference found in the representation (Exh. P 4) is that the kharwa community passed a resolution in the presence of returned candidate and that too the petitioner reliably learnt that such a resolution had been passed. Thirdly, the whole gravamen of the representation dated 30th November, 1984 was more in the nature of a complaint against Hira Bawa Ratro the head patel and kotval Kantilal Bawa and there is no iota of a grievance or blame sought to be made against the returned candidate that he was in any manner connected with this meeting or in the passing of the resolution or a privy in the commission of the corrupt practice and all that it mentioned was just his presence at the meeting. Considering the averments in the petition, the evidence that is finally adduced by the petitioner, the so called contemporaneous record the representation dated 30th November, 1984 (Exh. P - 4) therefore becomes a suspicious document and the possibility of preparing a case against the returned candidate even at that stage cannot be ruled out and more particularly so when I consider several other things that have come on record to which I will come from time to time.

71. Under Exh. P - 5 the petitioner has produced non-cognizable complaint under No. 169/84. This document (Exh. P 5) is given to the petitioner by the Police Officer-in-charge of Police Station, Diu once the petitioner lodged a complaint and which was treated as non-cognizable case. The story in respect of this complaint is no better than the first one (Exh. P - 4). This non-cognizable complaint discloses that the petitioner lodged a report against Hira Bawa, the head patel of the kharwa community and Kantilal Bawa, the kotval, alleging that on 29-11-84 at Ram Mandir a meeting was held where the two accused openly canvassed that kharwa community people should not vote for him and not to take part in his processions and gave threats of excommunication. There is again not even a whisper mentioned against the returned candidate in this non-cognizable complaint. This document needless to mention runs counter to the case set up in the petition and the oral evidence adduced by the petitioner. It is reasonable to believe and Shri Dhanuka is quite right for that matter that if the meeting was called to support the candidature of the returned candidate and in furtherance of his election prospects the purported resolution was to be passed and that resolution was transcribed by very returned candidate, besides addressing the gathering first, the complaint would have been directed against him more than any other person and therefore this document again loses its value and credibility and becomes a suspicious document.

72. The next so called contemporaneous documentary evidence produced consists of the complaint dated 30th November, 1984 addressed by Rambhai Nathoo Chauhan (P.W. 13) to the Returning Officer annexing thereto five affidavits all dated 30th November, 1984 by (1) Lalji Bawa Baraiya; (2) Purshottam Jiva; (3) Kishore Kumar Devji Kamalia; (4) Kamla Bhika; and (5) Sonaben Harji (Exh. P-8 Colly.) which are found at pages 275(a), 275(b), 275(c), 275(d), 275(e) and 275(f). This Exh. P-8 Colly. was produced with consent of the parties pursuant to a note recorded at page 275 of the Notes of evidence in course of cross-examination of Smt. Laxmiben Ratilal Ambina (P.W. 7). Shri Dias places reliance on this document again to show that this Exh. P-8 Colly. has got great bearing for it speaks of the

meeting held by kharwa community on 29th November, 1984 and how several persons in different choras even heard the pronouncement made by kotval in respect of the resolution passed. He is also suggesting that this Exh. P-8 Colly. is solely at the instance of Ram Nathoo Chauhan and duly supported by the deponents of the affidavits which are annexed to the representation made by said Ram Nathoo.

73. With regard to this Exh. P-8 it may be again seen that the representation mentions that a meeting was convened by the patel of kharwa community and a resolution was passed and pronounced publicly at all choras of the village of Goghla and for that matter even contents of the resolution are mentioned. Rambhai Nathoo Chauhan (P.W. 13) makes a grievance that no fair elections can be held if such things are permitted and seeks indulgence of the Returning Officer to take all lawful action so that the voters of Goghla are able to cast their votes freely and according to their choice. The affidavits of the various deponents who names I have already indicated besides mentioning as to what resolution was pronounced by the kotval, mentions the place where the deponents heard the kotval making that pronouncement. The first feature of these five affidavits is that they are all uniform in content from word to word and that way stereotyped. Neither in the representation of P.W. 13 nor in the affidavits there is a whisper against the returned candidate. This very representation makes a reference that two Government servants Shri Pancha Govind and Shri Rasik Mandan have even attended the kharwa community meeting and yet nothing is mentioned about the returned candidate. Although I will refer to the evidence of Rambhai Nathoo Chauhan (P.W. 13) in greater detail a little later some remarkable feature in relation to this Exh. P8 Colly. need be made. The first hand information of the meeting of kharwa community held on 29-11-84 was made available to him as mentioned by him by Babu Sakar Chauhan (P.W. 5) and Bimji Devji Chauhan (P.W. 11), the persons who are alleged to have attended that meeting, within minutes from the time that meeting ended. It is in evidence that there was a long discussion between him and P.Ws. 5 and 11 and he even asked them whether any protest was lodged and was found to be agitated because kharwa community had resolved earlier that no politics would be discussed at the meetings of kharwa community. The point that arises is if P.Ws. 5 and 11 told him that returned candidate addressed the gathering, wrote the resolution himself which was moved soliciting votes on the grounds of caste and community and by holding out the threat of excommunication could Rambhai Nathoo Chauhan (P.W. 13) miss that to be incorporated in his representation dated 30th November, 1984 addressed to the Returning Officer? There is another aspect which cannot be overruled. It is this Rambhai Nathoo Chauhan who gave the information for the first time to the petitioner at Diu on 30th November, 1984 as mentioned by him and corroborated by petitioner. The deponents of the affidavits are also not independent and free persons as claimed to be and we will see that a little later in the judgment when I discuss the oral evidence. Considering all this and the effect of other oral evidence it will have to be held that Rambhai Nathoo Chauhan (P.W. 13) is not one with kharwa community and is connected with the petitioner and that way the possibility of Exh. P-8 Colly. being got fabricated for some purpose in mind for eventual use cannot be ruled out. Equally therefore Exh. P-8 Colly. is not above board.

74. The returned candidate in his defence through witness No. RW. 5 Farooq Karim Qazi got proved Exh. R. 13 which had been earlier produced and marked as Exh. X to be eventually proved. This Exh. R-13 is an issue of a weekly called 'Meri Awaz' printed, published and edited in Una by said Farooq Qazi. A news item been published at page 2 of this Weekly (Exh. R-13) that head patel Hira Bawa Ratro has made a statement before the Civil Administrator. When questioned by latter with regard to the veracity of kharwa community having made any resolution on the ground of caste and community denied the same and further held out that members of kharwa community are free to vote a candidate of their choice and according to their conscience. Relying upon this Exh. R-13 Mr. Dias mentions that even this document lends support to the case of the petitioner inasmuch as Hira Bawa never denied that no meeting was held by the kharwa community on 29-11-84 at Ram Mandir and further does not deny that the returned candidate was present. He however mentions that Hira Bawa Ratro had to deny the existence of the resolution because it is well known that otherwise it is an electoral offence. I will however come to the discussion on this subject when I come to discuss the oral evidence on behalf of both sides. In fact a special treatment would be needed in the matter of evidence of the Editor 'Meri Awaz' (Exh. R-13). Suffice at this moment only to

mention that document by itself does not help the petitioner in relying upon it as a contemporaneous documentary evidence in support of the corrupt practices.

75. At the instance of the returned candidate reliance was placed on the affidavits got made by Babubai Sakar P.W. 5, Bimji Devji P.W. 11, Smt. Lakshimiben Ratilal P.W. 7 and Amritlal Manji P.W. 12, the copies of which were lying in the office of the Mamlatdar. On summons being issued those copies were produced by R.W. 8, a Lower Division Clerk who was deputed by Mamlatdar for its production in Court. In these affidavits the deponents speak about the meeting held by kharwa community on 29th November, 1984. Mr. Dias also wants to say that even these affidavits lend support to the petitioner's case for they are also in a way contemporaneous record further suggesting that the deponents were excommunicated on account of their participation in the election process of the petitioner, indicating thereby that their excommunication is attributable directly to the resolution passed by the kharwa community on 29th November, 1984.

76. It is pertinent to note that the deponents of these affidavits have already been examined as petitioner's witnesses and necessary appreciation of their evidence will come at the appropriate time, but suffice for the moment to mention that these affidavits by themselves do not advance the petitioner's case, because they are totally silent on the aspect that the returned candidate himself made an appeal to the voters on the ground of caste and community or that he wrote down the resolution in his own handwriting, although reference exists that the returned candidate was present, discussed his performance as M.L.A. and appealed to the community to help him in the ensuing elections. These affidavits are marked as Exh. R-15 Colly. and they are found at pages 943(c), 943(e), 943(g), 943(i). At any rate these affidavits were executed on 11th January, 1985 much after the results in the last general elections were declared and considering the totality of circumstances including the oral evidence of all these witnesses and their bias for the kharwa community as also the returned candidate the possibility of this Exh. R-15 Colly. being got done at the instance of the petitioner cannot be ruled out. In any event, a great shadow is cast on this documentary evidence.

77. I have sufficiently adverted to the oral evidence adduced on behalf of the petitioner highlighting as to what they spoke in relation to how the meeting of wharwa community got started, reference to the speech of the returned candidate then to the speech of Hira Bawa Ratro, the head patel, ex-patel Pancha Govind and Rasik Mandan Bedi, and the reference to the returned candidate having written the resolution and the same thereafter was read aloud by the head patel and after passing the same in the manner in which the signatures were made not only by the head patel, Pancha Govind, returned candidate and other Aghewans and thereafter by the kharwas who were present at the meeting. The witnesses have also spoken about the contents of the resolution that was purported to have been passed at that meeting. Equally reference has been made to certain of the witnesses as to how they heard the kotwal making the announcement of the convening of the meeting in different choras in the morning and the pronouncement of the resolution by kotwal again at different choras in the evening of the same day. It is now contended by Shri Dias that on the main corrupt practice averred to by the petitioner in the petition the evidence of the witnesses is straightforward and without any blemish or infirmity and being so, it is just not possible for the Court to brush it aside. He further says that there may be some discrepancies and for that matter even some inconsistencies but that according to him are concerning matters extraneous to the main incident of holding the meeting and the passage of the resolution. He urges that in as much as the returned candidate has not been able to pinpoint any discrepancy or blemish or infirmity on the main aspect of the two corrupt practices spoken to by the witnesses, the oral testimony tendered by all these witnesses becomes credit worthy and reliable. He therefore argues that the evidence clearly points out that a meeting was held at which the resolution was passed and that resolution was announced in all choras on the evening of the same day and by no stretch of imagination it could be held that this evidence is insufficient or that the corrupt practices averred by the petitioner are not proved. He further contends that although in his written statement the returned candidate had made a simple denial of his presence at Goghla on the morning and forenoon of 29th November, 1984, however in his oral evidence he has taken an alibi that he had been to Vanakbara to persuade

three other contestants to withdraw their nomination forms, thereby leaving himself in the field to oppose the petitioner, the returned candidate has miserably failed to prove that alibi. He therefore urges that once the alibi taken by the returned candidates failed it gives added support to the petitioner's case that the returned candidate was present not only in Goghla but at Ram Mandir for the kharwa community meeting.

78. He next brings to bear before me that the returned candidate in his defence has finally stated that a meeting was held at 11 a.m. at Ram Mandir on 29th November, 1984, but however to discuss labour problem relating to women workers. Mr. Dias therefore urges that finally the returned candidate has come round and admitted that some meeting was held at Ram Mandir and dispute is only now as to whether it was a meeting of the kharwa community in furtherance of the election prospects of the returned candidate as made out by the petitioner or a meeting to discuss the labour problem as held out by the returned candidate. Referring to the evidence led on behalf of the returned candidate, Mr. Dias points out that the evidence adduced by the defence that the meeting was in connection with labour problem is highly improbable because of the several inconsistencies and infirmities existing in the evidence of the persons who are said to have attended that meeting. After referring to the evidence of Ram Govind Dhapa R.W. 3 and Panch Parbat Solanki R.W. 7, he says that these witnesses stand discredited as also their evidence and this being the position, the meeting that was held must be referable to and only to the kharwa community meeting to assist the returned candidate in furtherance of his election prospects and with a view to get out of that situation the returned candidate brought these two witnesses R.W. 3 and R.W. 7 to say that the meeting was for a different purpose although there was not even such a disclosure in the written statement.

79. He next mentions that it is in evidence and clearly proved that all proceedings of the meetings of the kharwa community are recorded in the books which are maintained by each and every patel during his tenure. This record speaks for itself not only with regard to what transpired in the meeting but also with regard to who attended such meetings. He therefore argues that if in reality the meeting of 29-11-84 was for discussion of the labour problem relating to women workers and not as averred by the petitioner it was clearly incumbent upon the returned candidate to have relied upon and got produced the books of the meetings of kharwa community to show that the meeting of 29-11-84 discussed that labour problem. That having not been done an adverse inference must be drawn against the returned candidate and thus viewed in that context and based on the unblemished evidence, I must hold that the petitioner has proved that in fact, the kharwa community met on 29-11-84 which made that resolution and therefore the corrupt practices of undue influence and appeal to the voters in the name of caste and community must be held proved.

80. On this aspect he places reliance in the decision of *Ram Sharan Yadav v. Thakur Muneshwar Nath Singh and others*, reported in A. I. R. 1985 S. C., page 24. It is true that in this case in paragraph 7 it is held:—

"There is no ritualistic formula nor a cut-and-dried test to lay down as to how a charge of undue influence can be proved but if all the circumstances taken together lead to the irresistible inference that the voters were pressurised, threatened or assaulted at the instance of either the candidate or his supporters or agents with his consent or with his agents' consent that should be sufficient to vitiate the election of the returned candidate."

In paragraph 8 it is mentioned:—

"We would, however, like to add a word of caution regarding the nature of approach to be made in cases where allegations of fraud or undue influence are made. While insisting on standard of strict proof, the Court should not extend or stretch this doctrine to such an extreme extent as to make it well-nigh impossible to prove an allegation of corrupt practice. Such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electoral process."

Equally reliance has been also placed in the authority of *S. Harcharan Singh v. S. Sajjan Singh and others*, reported in A.I.R. 1985 S.C. page 236. In paragraph 64 it is observed:—

"While insisting on standard of strict proof, the Court should not extend or stretch this doctrine to

such an extreme extent as to make it well-nigh impossible to prove an allegation of corrupt practice. Such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electoral process."

There is no dispute as to what is being held by the Supreme Court in these two authorities, but it must however be seen that the requirement of strict proof in the matter of corrupt practice in election disputes proving the charges like in a criminal case and not on preponderance of probability has never been given up and it will always depend upon the peculiar facts and circumstances of each and every case and type of evidence. For that matter Supreme Court itself has laid down that in the matter of proof in election disputes on when and why a witness has been accepted or rejected cannot be strictly based on precedents. Even in the matter of *Ram Sharan Yadav v. Thakur Muneshwar Nath Singh and others* (A.I.R. 1985 S.C. page 24) after transcribing the passage extracted above, in paragraph 9 the Supreme Court held as follows:—

"By and large, the Court in such cases while appreciating or analysing the evidence must be guided by the following considerations:

- 1) the nature, character, respectability and credibility of the evidence,
- 2) the surrounding circumstances and the improbabilities appearing in the case,
- 3) the slowness of the appellate court to disturb a finding of fact arrived at by the trial court who had the initial advantage of observing the behaviour, character and demeanour of the witnesses appearing before it, and
- 4) the totality of the effect of the entire evidence which leaves a lasting impression regarding the corrupt practices alleged."

81. Mr. Dias strenuously contended that in the facts and circumstances of the present case and from the evidence on record on both sides a case for an adverse inference against the returned candidate is made out on two grounds. Elaborating this proposition he mentions that right from the beginning in the petition the petitioner has averred that Hira Bawa Ratro had been the agent of the returned candidate and he acted as such during the election time. Undisputably Hira Bawa Ratro had been the proposer to sponsor nomination form of the returned candidate which was filed before the Returning Officer. He therefore insists that it was clearly incumbent upon the returned candidate to have firstly examined Hira Bawa Ratro as his witness in his defence and that having not been done adverse inference must be drawn. There is another reason according to Shri Dias why Hira Bawa Ratro should have been examined. This Hira Bawa Ratro would have given the reason for which the meeting of kharwa community was held on 29-11-84 and secondly he could have also given the reasons why several persons were excommunicated and more particularly of those who had been examined as petitioner's witnesses as also the time at which they were excommunicated because in most of the cases it is the case of the returned candidate that there has been no excommunication on account of election affairs and whatever excommunications had come about were for entirely different reasons not connected with election affairs. The second ground for adverse inference according to Shri Dias is when the dispute had been ranging between the parties with regard to the meetings of kharwa community and excommunications of various witnesses and the reasons thereof it was clearly incumbent upon the returned candidate to have relied upon and produced the various books of the minutes of kharwa community to show what was discussed in the meetings, or what resolutions had been made, the time at which various witnesses were excommunicated and that way the real picture would have emerged. He further points out that even when petitioner made an attempt to get Hira Bawa Ratro as a Court witness and another attempt to get various books of meetings of kharwa community from 1979 to 1983 produced on record, the returned candidate vehemently opposed the same thereby stalling the reality to come out. He now therefore urges that if adverse inference as pleaded by him is accepted the petitioner is through this petition and the petition must succeed.

82. I will however come to the last argument of Shri Dias on the matter of adverse inference first. According to Shri Dhanuka, learned counsel for the returned candidate, the petitioner is not entitled to speak about an adverse inference being taken against the returned candidate and according to him the facts that have transpired in this very case are

enough to demolish his claim for adverse inference. In this case he points out that all the parties in the present dispute are bound by two orders of this Court, one delivered on 11-2-86 (Exh. 108) and the other dated 5th March, 1986 (Exh. 130). Placing reliance on these two orders it is contended by him that once factually this Court has already held that the petitioner not having relied upon the written documentary evidence of the so called various resolutions during his turn of evidence, he cannot seek the production of such records afterwards and further that this Court has already rendered finding that the omission of the petitioner was intentional. It does not now lie in the mouth of the petitioner to contend that adverse inference must be drawn against the returned candidate as sought to be made out, for both the parties are bound by the two orders given by the Court vide Exh. 108 and Exh. 130.

83. There is a lot of substance in what Mr. Dhanuka, learned counsel says. Admittedly, the petitioner's evidence was declared closed on 27th November, 1985. The returned candidate began his defence on 9th January, 1986. During the cross-examination of returned candidate an application dated 13th January, 1986 was filed by the petitioner, that it has become necessary for the petitioner to produce certain documents for cross-examination of returned candidate and his witnesses and they are further necessary to produce in answer to the case set up by the returned candidate. The documents required were the resolutions of the community in relation to the excommunications, fines and effects of excommunications and which were made during the tenure of each patel and secondly the books pertaining to fines, engagements for the period from 1979 to 1983 as also the books relating to 1984 and 1985. After hearing the respondent/returned candidate an order was made by this Court on 11th February, 1986 vide Exh. 108 rejecting the application filed by the petitioner. The reasons which prompted me to reject this application were firstly that the application is vague there being no mention about the particulars with regard to the exact meetings or resolutions that the petitioner wanted to rely nor has the petitioner given an indication at the time of arguments that he wants to rely upon certain resolutions which are vitally important for the purposes of cross-examination of the returned candidate. The other vital reason that also prompted me to reject that application was that if these documents were in reality necessary for the petitioner's case the petitioner himself would have relied upon the same and sought its production through the person from whom he was trying to get them produced. I also observed that the petitioner had been all along aware that several of his witnesses had been excommunicated and from that point of view to prove that they were excommunicated from a particular date and if it was essential for the petitioner's case petitioner could have relied upon the same. Another reason mentioned by me in that order was that this being an election dispute and petitioner having not relied upon certain documents, he cannot be permitted to rely upon documents to take the adversary by surprise. And lastly that considering the corrupt practice alleged the question of getting records of excommunications or resolutions of fines, engagements and other meetings of the community are in no way concerned. Still not being content, the petitioner presented another application on 11-2-86 seeking indulgence of the Court for production of the so called resolution passed in the meeting of the kharwa community held on 29-11-84 and alleged to have been written on loose papers alleging that that resolution is most important for the case of the petitioner and being so very material document. Hira Bawa Ratro be summoned to produce it before the Court. The second prayer in this application is that Hira Bawa Ratro being the key figure in calling the meeting of 29-11-84 and having used his position to pass the purported resolution he should be examined by the Court as a Court witness. This was opposed by the returned candidate on several grounds. By my order dated 5th March, 1986 (Exh. 130) I rejected this application of the petitioner dated 11-2-86. Mr. Dhanuka is right in placing reliance in paragraphs 5, 7, 15, 16 and 19 of that order. Several reasons prompted me to dismiss the petitioner's application. I can usefully extract some of the findings made in that order (Exh. 130). In paragraph 15 I observed:—

"Firstly it must be seen that even before the petition was filed it was within the knowledge of the petitioner that such a resolution was made by kharwa community as it was his own case and that information was given to him by Bimji Devji Chauhan (P.W. 11) and Babu Sakar (P.W. 5). These witnesses together with another three witnesses namely Amritlal Manji P.W. 12, Pradip Kumar Devji Kamaliya (P.W. 9) and Hira Lakshman (P.W. 10) have all unanimously said that such a resolu-

tion is in writing and that too in the hand of the respondent no. 1 and that it was written on loose sheets of paper. Therefore this information was clearly given to the petitioner who failed to aver the same in his petition and did not further rely upon that document in the List of Documents nor sought its production at any time when the petitioner's evidence had been going on. Therefore the omission on the part of the petitioner is deliberate and intentional. Viewed thus it is therefore clear that the petitioner deliberately chose not to rely upon that document nor to get an order for production of that document from said Ratro and therefore the omission was clearly intentional."

84. In paragraph 19 it was observed:—

"The exercise of power under Order 16 rule 14 C.P.C. in the matter relating to corrupt practice which is otherwise required to be proved to the hilt by the person who disputes the election Court is required to keep itself at arms length."

This ratio was culled out by me from the decision in the case of *Khaje Khanavar Khadar Khan Hussain Khan and another v. Siddavanahalli Nijalingappa and another*, reported in A.I.R. 1969 S.C., page 1034 and it is in that context that I rejected Ratro to be examined as a Court witness.

85. Once I have rendered certain findings there is no doubt that both parties are bound by them and I am unable to reopen those findings and take a different view now. Besides, it must be seen that once I held that the petitioner knew about the resolution being in writing it was clearly incumbent upon him to make an effort to get it produced through Court. The petitioner did not do it, for that matter he did not even mention it in the petition. The further finding is that the petitioner intentionally and deliberately chose not to rely upon that resolution nor made any attempt to get Ratro as his witness and sought the assistance of the Court only to get Ratro cross-examined. I therefore hold that it is too late for the petitioner in the day to now seek before this Court that adverse inference is liable to be drawn against the returned candidate firstly for not having produced Hira Bawa Ratro as his witness and secondly for not having produced the various resolutions or the book of resolutions or the books relating to records of excommunications and fines. The argument of Shri Dias for drawing of adverse inference against the returned candidate must therefore be rejected.

85A. Even otherwise, the adverse inference as sought for by Mr. Dias against the returned candidate cannot be made available to the petitioner. It must be seen that at all times the petitioner has to prove corrupt practices and he must prove them to the hilt and if he fails to prove the election petition is liable to be rejected. Once the burden is entirely cast on the petitioner unless he discharges the onus of proof and shifts the burden on the returned candidate no demand can be made from the returned candidate to prove his case or that he had not committed any of the corrupt practices alleged against him. The other aspect is that once the election petition is equated as a quasi criminal proceedings the requirements of proof is that of a criminal charge in a criminal case and even viewed from this angle the accused in a criminal case does not have to prove anything and it is always for the prosecution to establish the charges. Although I have made a reference to several authorities, even for the purpose of rejecting the argument of Mr. Dias vis-a-vis the adverse inference, I can advantageously transcribe what is laid down by the Supreme Court in A.I.R. 1984 S.C., page 960:—

"There is total consensus of judicial opinion that a charge of corrupt practice under the Act has to be proved beyond reasonable doubt and the standard of proof is the same as in a criminal case."

Same principle was reiterated a little later by the Supreme Court in A.I.R. 1984 S.C. page 1161:—

"It is now well settled by several authorities of this Court that an allegation of corrupt practice must be proved as strictly as a criminal charge and the principle of preponderance of probabilities would not apply to corrupt practices envisaged by the Act because if this test is not applied a very serious prejudice would be caused to the elected candidate who may be disqualified for a period of six years from fighting any election, which will adversely affect the electoral process."

I have to therefore hold that it was clearly for the petitioner to have either produced the records of the kharwa

community to prove the various resolutions and/or excommunications or fines and further to have examined Hira Bawa Ratro and the non-production of that material and non-examination of head patel by returned candidate cannot be held against him.

86. Mr. Dias, the learned counsel for the petitioner, relied upon a number of authorities and a reference need be made to them. Referring to the decision of the Supreme Court in *Sarwan Singh v. State of Punjab* (A.I.R. 1957 S.C. 637), he mentions that in the trial of a criminal case for murder, highest standard is demanded and even when such a highest standard demanded for the trial of a criminal case is made applicable to the present case, yet it must be held that the petitioner has proved his case because there are no discrepancies in the matter of intrinsic evidence in relation to the meeting of the kharwa community and the evidence relating to corrupt practices alleged.

87. Referring to the decision in the case of *Rahim Khan v. Khurshid Ahmed* (A.I.R. 1975 S.C., page 290), he refers to the passage in para 8 which lays down that:—

"It is of the first importance that elections must be free and fair if the democratic system is not to founder. Not long ago a Chief Justice of this Court, delivering the Lajpatrai Memorial Lecture, observed:—

"Untruth before elections, during elections and after elections seem to be too prevalent for a healthy political society."

The same paragraph quotes a passage from the decision in *Harcharan Singh's case* (A.I.R. 1968 S.C. 1500) at page 1504:—

"The primary purpose of the diverse provisions of the election law which may appear to be technical is to safeguard the purity of the election process, and the Courts will not ordinarily minimise their operation."

Coming to para 19, he mentions that merely because the witnesses examined are partisans, being polling agents, counting agents or workers of the Congress candidate, such evidence has to be viewed with circumspection, but cannot be dismissed outright. That part for that matter also lays down:—

"Of course, if their evidence is intrinsically sound, if their demeanour is impressive otherwise, if the incontrovertible facts and broad probabilities fit in with their version and other desinterested testimony on the same point is forthcoming, we should not disbelieve the case merely because some tainted evidence is also placed on the record. In this view, we have to scan the oral evidence rather carefully, lest the verdict of the people at the polls should be nullified on uncertain and dubious evidence."

He, thereafter, quotes the golden rules as George Bernard Shaw spoke about that there are no golden rules which is referred to in para 20 of this authority.

88. Referring to the decision in *Kanhailal v. Mannalal*, reported in A.I.R. 1976 S.C. 1886, he mentions that *Rahim Khan's case* (supra) dealing with oral testimony in election cases had been relied upon and in para 24 it shows how the appreciation of evidence must be done.

89. He next refers to the decision in *H. P. Administration v. Om Prakash*, reported in A.I.R. 1972 S.C. Page 975 in para 5, it has been laid down by the Supreme Court that in appreciating the evidence against the accused the prime duty of a Court is firstly to ensure that the evidence is legally admissible, that the witnesses who speak to it are credible and have no interest in implicating him or have ulterior motive. He further refers to para 6 to say that various tests have been laid down where it is said:—

"It is therefore, difficult to expect a scientific or mathematical exactitude while dealing with such evidence or arriving at a true conclusion. Because of these difficulties corroboration is sought wherever possible and the maxim that the accused should be given the benefit of doubt becomes pivotal in the prosecution of offenders which in other words means that the prosecution must prove its case against an accused beyond reasonable doubt by a sufficiency of credible evidence. The benefit of doubt to which the accused is entitled is reasonable doubt—the doubt which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind which fights shy—though unwittingly it may be—or is afraid of the logical consequences, if that benefit was not given or as one great Judge said it is "not the doubt of a vacillating mind that has not the moral courage

to decide but shelters itself in a vain and idle scepticism." It does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the offence."

90. Laying his hand on the decision in *Ram Sharan Yadav v. Thakur Muneshwar Nath Singh*, reported in A.I.R. 1985 S.C. 24, he mentions that there is no ritualistic formula nor a cut-and-dried test to lay down as to how a charge of undue influence can be proved but if all the circumstances taken together lead to the irresistible inference that the voters were pressurised, threatened or assaulted at the instance of either the candidate or his supporters or agents with his consent or with his agents' consent that should be sufficient to vitiate the election of the returned candidate. The Court has observed in this very case that in cases where the allegations of fraud or undue influence are made while insisting on standard of strict proof, the Court should not extend or stretch this doctrine to such an extreme extent to make it well-nigh impossible to prove an allegation of corrupt practice. The important words, according to Mr. Dias, are "such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electoral process".

91. More or less the same ratio is spoken by the Supreme Court in the case of *Harcharan Singh v. Sajjan Singh*, reported in A.I.R. 1985 S.C. 236. While approving the principle laid down in *Ram Sharan Yadav's* case (AIR 1985 S.C. 24), it is held that the paramount and basic purpose underlying Section 123(3) of the Act is the concept of secular democracy. The inhibition of Section 123(3) should not be permitted to be circumvented indirectly or by circuitous or subtle devices. The Court should attach importance to the effect that impact of the acts complained of, always keep in mind the paramount purpose of Section 123(3), namely, to prevent religious influence from entering the electoral field.

92. Referring to the case of *Birbal Singh v. Kedar Nath*, reported in A.I.R. 1977 S.C., page 1, he says that it has been clearly held by the Supreme Court that interested witnesses are not necessarily false witnesses though the fact that the witness has a personal interest or stake in the matter must put the Court on its guard. The evidence of such witnesses must be subjected to a closer scrutiny and indeed the Court may in a given case be justified in rejecting that evidence unless it is corroborated from an independent source.

93. Lastly, he relied on the decision of the Supreme Court in *Ram Singh v. Col. Ram Singh*, reported in A.I.R. 1986 S.C. page 3, to suggest that inferences can be drawn against the party who does not call for evidence which is available to him and which could have been brought.

94. The principle that oral evidence is admissible even in election petitions has been clearly laid down in the case of *Pratap Singh v. Rajinder Singh*, reported in A.I.R. 1975 S.C. page 1045. This authority further lays down that when a witness solemnly deposes on oath before a judicial tribunal is a witness of truth unless the contrary is shown and that the evidence of the very witness in an election case cannot be dubbed as intrinsically suspect or defective and cannot be equated with that of an accomplice in a criminal case whose testimony has, according to a rule of practice though not of law, to be corroborated in material particulars before it is relied upon.

95. Mr. Dias has relied upon all these authorities not only in support of his case to show that merely because some of the witnesses of the petitioner were polling agents or were found to have some interest of their own as against the Kharwa community, they are not liable to be held as untrustworthy and for various other propositions and also to counter the propositions and authorities submitted on behalf of the returned candidate.

96. As regards the oral evidence adduced by the petitioner in support of the corrupt practice of (i) undue influence and (ii) appeal in the name of caste and community, it must be said that all the witnesses have uniformly and unanimously spoken as to how they attended the meeting and what transpired in that meeting. On the details of the meeting and the alleged corrupt practices, there are no contradictions so-called nor, for that matter, infirmities. But, however, it must be seen that it is a chorus song though sang individually.

97. All the witnesses of the petitioner, in my assessment, have tendered partisan evidence and they are highly biased against the kharwa community. Most of the witnesses have

bias against the returned candidate because of the incident of arson and morcha of 30-6-1983 in which several houses were demolished and damaged. Certain witnesses have been directly affected by that incident and even suffered injuries and they have even implicated returned candidate with criminal offences. That incident of 30-6-1983 has led to a faction of the kharwa community being against majority of the community and it is not difficult to hold that on account of that faction, some of the witnesses had been excommunicated and they had to flee from Goghla and take up residences at Diu. The other aspect is that they were against the kharwa community as a result of excommunication and once excommunicated are somehow found to side with the petitioner and that is how they have come to this Court to depose not only in favour of the petitioner, but against the returned candidate. Their evidence is, therefore, highly unreliable and unsafe to unsettle the election in the purported name of purity of elections.

98. From the totality of circumstances, it is not possible to rule out that certain things were pre-planned. In this connection, I have already highlighted as to how the so-called contemporaneous documentary evidence has to be ruled out for want of good and cogent reasons. The version made in the petition is different from the evidence adduced and there is even great divergence between the documentary evidence and the oral evidence. For instance, it is never the case of the petitioner either in the petition or in the contemporaneous documentary evidence that returned candidate addressed the meeting of the kharwa community at Ram Mandir on 29th November, 1984, or that whatever resolution was passed was in writing and further that it was in the hand of the very respondent/ returned candidate. All these factors leave indelible mark on the evidence to be entirely got up.

99. In the light of this, I will now come to each of the petitioner's witnesses and make the necessary comment.

100. Let me first take up the witnesses who said that they attended the meeting of 29-11-1984. P.W. 5 Babu Sakar Chauhan happened to attend the meeting of 29-11-1984 by chance as he happened to go to Mandir. He himself says that he was not aware that a meeting was going to be held there. Admittedly, he was the polling agent for the petitioner and acted as such, because Ram Nathoo Chauhan (P.W. 13) requested him to be the polling agent. He along with Bimji Devji Chauhan (P.W. 11) met the aforementioned Ram Nathoo Chauhan (P.W. 13) immediately after the meeting and narrated the story to him. He speaks of again having met the aforesaid Bimji Devji Chauhan at Diu on the following day and how they were both accosted by Nathoo Chauhan and taken to the petitioner to give him the confirmation of the story of the meeting of the earlier day. Admittedly, the house of this witness was damaged, in the incident of 30th June, 1983, and he suffered loss to the tune of Rs. 15,000/- to Rs. 20,000/-. He is one of those persons who swore an affidavit saying that he was excommunicated and finally, that affidavit was never filed before any authority and it is his case that it is lying with one Dharamsi Somvar. As to why this man at all should get an affidavit prepared is a mystery because it was never made use of for any purpose. At the time of swearing this affidavit, he was accompanied by Ram Nathoo Chauhan and other persons Bimji Devji Chauhan (P.W. 11), Laxmiben Ratilal (P.W. 7) and Amritlal Manji (P.W. 12) who also similarly swore affidavits and all of them are lying with the said Dharamsi Somvar. A suggestion was made to him that he has been excommunicated soon after the incident of 30-6-1983 but, however, he has denied and stated that he was excommunicated after the election. The fact remains that he belongs to the other faction and for which reason his house had been demolished in the incident and, therefore, it is believable that he must have been excommunicated soon after 30-6-1983 and there is nothing on record that he was excommunicated after the elections. On a preponderance of evidence, when he was already excommunicated immediately after 30-6-1983 one thing is clear that this witness could not have attended the meeting of the kharwa community on 29-11-1984. If excommunicates cannot keep contact with members of kharwa community and for various effects spoken to, it may be reasonably held that excommunicates are not permitted to go to temples and take part in the community meetings. That his evidence is biased is clear because his house was badly damaged to the extent of damage worth Rs. 15,000/- to Rs. 20,000/- and, according to him, that morcha was led by returned candidate and it is that morcha which damaged his house. His evidence taken with the evidence of Bimji Devji Chauhan (P.W. 11) also contains contradictions *inter se* in the matter of going to Advocate B. M. Rawal accompanied by Ram Nathoo Chauhan. Again the house

of his sister Javerben was also burnt by the rioters on 30-6-1983. This Javerben is, admittedly, the mother of another witness, Laxiben Ratilal (P.W. 7). For all these reasons, it is not possible to hold that the evidence of P.W. 5 Babu Sakar is reliable and safe in the matter of corrupt practices and on the contrary must be held to be tainted.

101. Coming to P.W. 9 Pradip Devji Kamalia, he was again the polling agent of the petitioner. The most interesting part of his evidence is when he says that he does not know for whom he worked as a polling agent on the date of the poll at the last general elections. It is difficult to accept that a person who acts as a polling agent does not even know for which candidate he was so acting. He admits that he became polling agent at the instance of Sakar Nathoo Botio (P.W. 14), who admittedly, assisted the petitioner in his elections and whose evidence I will come a little later. According to this witness, he attended the meeting of kharwa community on 29-11-1984, but it must be seen that his family had been the victim of the riots of 30-6-1983. Their house having been damaged it is in evidence that his family shifted to Diu and for quite sometime accommodated in the relief camp set up by the Government. Undisputably the petitioner had helped all these families from Goghla who were at the relief camp by providing them assistance. The question, therefore, that arises is if this witness has already shifted to Diu, how can he hear the announcement of the meeting and attend the meeting of kharwa community on 29-11-1984? This witness does not again inspire confidence because, he has not attended any other meeting after 29-11-1984. He was not able to give the particulars of any other meeting he attended nor the subject discussed at any other meeting at any time earlier. Although he pretended ignorance at certain stage, finally, he came out saying that he is related to Sakar Nathoo Botio (P.W. 14) in the relationship of his father being the maternal uncle of Sakar Nathoo Botio. He displayed unnatural conduct when he stated that he does not know where the families whose houses were burnt in the incident of 30-6-1983 took shelter and that he was not aware whether the petitioner initially gave assistance for rehabilitating the riot affected persons including his family or that his family received such assistance from the petitioner. For all these reasons it is not possible to hold that the evidence tendered by this witness is not tainted and it can be relied upon. It must be held that he belongs to that small faction of the community which is against the majority community and is entirely under the influence of Sakar Nathoo Botio (P.W. 14).

102. Coming to P.W. 10 Hira Lakshman Solanki, it must be said that his evidence is more a tell tale than otherwise. His entire evidence seems to be in the realm of fiction. He himself offered to be a witness to the petitioner and, accordingly, contacted him. As to how he offered himself to be a witness, his story is that on one Thursday evening he had gone to the shop of one Babubhai to have liquor where there was a talk about the recent elections; that one person was saying whatever resolution passed by the kharwa community and getting the returned candidate elected on the strength of it is not a good thing. Then, he says that he intervened in the talk. The owner of the liquor shop Babubhai asked him whether he would give evidence to which he agreed. On the following day, Babubhai took him to the petitioner at Diu. But, however, Babubhai did not want to be seen to have met the petitioner for fear that he might be seen by one Balu Mandan and report the matter to the head Patel. Once he met the petitioner, he offered to be his witness. But the most interesting part of his evidence comes when the petitioner asked him as to what evidence he would give, this witness told the petitioner that he would not like to disclose the same to the petitioner and he would tell the Court what he wants. The question is, a man who is not prepared to disclose what evidence he is going to tender, how could the petitioner at all cite him as his witness and introduce him into the witness box. Again, it is common ground that this witness has been excommunicated and it has been suggested to him that he has been excommunicated because of his ill treatment to his wife. The ground given by him for his having been excommunicated on 7-5-1985 is that on 20th April, 1985 he talked to another person known as Virji who had been earlier excommunicated. But the fact remains that he admits that his wife stays in Bombay. It is his case that he had made a representation regarding this excommunication. Another unbelievable story about this man is that it is common ground that most of the petitioner's witnesses were residing at Rajesh Lodge at Panaji, Goa, when they came to tender evidence in this petition. Despite the fact that at one stage he admits that he was staying in the room occupied by Bimji Devji Chauhan, he contradicts himself and says that he never met Bimji Devji in the Rajesh Lodge. The funniest part of the

story is that he never met the petitioner before March, 1985 and he had no acquaintance with him and yet volunteers to be his witness and, according to him, he spent thousands of rupees for being in Goa in connection with his evidence which is highly doubtful. If based on evidence of this type election results are to be interfered with, there would be no end to the election process in this country. His evidence is highly imaginary and in all respect false.

103. Coming to Bimji Devji Chauhan (P.W. 11), he is one of those witnesses who alleges to be present at the meeting of 29-11-1984 at Ram Mandir. According to him, he attended that meeting because that meeting had been convened by head Patel Hira Bawa and it was in connection with the election and having heard the announcement from the Kotval, he came to Ram Mandir. It is an admitted fact that he was the polling agent of the petitioner on the day of the polling at the last general elections. But, however, he says that he worked with a view to get Rs. 100/- which was paid to him, but at all times he was trying to disassociate himself from the petitioner. There are several remarkable features of this witness which make his evidence highly tainted. For instance, he says that Raghav Lala proposed him to be the polling agent, but he did not know for which candidate or for whom he was acting as a polling agent. It is needless to mention that this is highly unnatural. He admits that he has been excommunicated by the kharwa community on 29-1-1982. With a view to make believe his story, he says that once he was excommunicated in the year 1982, he paid the fine and was taken back in the fold of the community. No documentary evidence has been produced by him to suggest that once he was excommunicated, he was taken back in the fold of the community prior to 29-11-1984. Obviously, if he continues to be excommunicated, he could not have attended that meeting at Ram Mandir. His evidence about his attending the meeting appears to be highly suspicious. For instance, according to Ram Nathoo Chauhan (P.W. 13) and Babu Sakar Chauhan (P.W. 5) they met the petitioner on 30-11-1984 at Diu to tell him the story of the meeting of the earlier day. In fact, the petitioner wanted to confirm the story of the meeting of the kharwa community from this witness and Babu Sakar Chauhan, because sometime earlier, P.W. 13 Ram Nathoo Chauhan had already informed the petitioner about the same. This witness says that he told the story of the meeting to the petitioner and the petitioner was satisfied. But, however, it is remarkable to see at page 484 of the notes of evidence this witness says:—

"I reiterate that we did not mention to the petitioner that the meeting was addressed by respondent no. 1, Pancha Govind, Rasik Mandan and Hira Bawa Ratro. We did not also mention that that meeting had been attended by Hira Bawa Ratro, Rasik Mandan, Pancha Govind and respondent no. 1. No such a talk took place. We also did not mention that respondent no. 1 wrote down a resolution on a piece of paper and handed it over to Patel Hira Bawa Ratro."

But he categorically mentions at page 483 that when the petitioner met him and asked as to what happened at the meeting the witness said:—

"Narayanbhai a resolution has been passed by our community that everybody should vote for Shamjibhi and nobody should vote for Narayan Fugro as Narayan Fugro is not from our village nor belongs to our community. Nobody should go to his office nor anybody should attend his meetings nor participate in the processions and if anybody does so he shall be treated as an offender of the community and will be excommunicated."

He also further mentions that when the petitioner asked whether all this that had happened, he replied 'Yes' to that question and, thereafter, they dispersed. Considering these two quotations of the witness, there is inherent contradiction when this witness in examination-in-chief mentions that the meeting was addressed by respondent No. 1 and that after his speech he wrote down the resolution, that too on a loose paper in his own handwriting. The question arises that if this is the truth why he did not disclose it to the petitioner on the very next day of the meeting. It must be seen that even the petition does not disclose that this witness had attended that meeting nor for that matter that the returned candidate addressed the gathering and that he wrote the resolution and that was in his own handwriting. It is needless to point out that embellishments were brought in by this witness to somehow support the case of the petitioner which is clear from his evidence. It is in evidence that he along with several other persons swore an affidavit that he was excommunicated, but mentions that affidavit

is lying with one Dharamsi Somvar. When question was put to him as to the purpose of swearing that affidavit the witness mentioned, to file it before the appropriate authority so that action is taken and elections are held in a free and impartial manner. When asked if that be the case why should he leave the affidavit in the hands of Dharamsi Somvar, the answer given by this witness is unbelievable and unnatural when he mentions that Dharamsi Somvar said that the fact of the execution of the affidavit is enough and there is no need of any further action. It is in evidence that P.W. 13 Ram Nathoo Chauhan had taken extra steps in the matter of exposing kharwa community for passing the resolution. This Bimji Devji Chauhan had even gone accompanied by P.W. 13 Ram Nathoo Chauhan to get the affidavit prepared from Advocate B. M. Raval along with a group of persons. Therefore, his association with P.W. 13 Ram Nathoo Chauhan is clearly proved. Ram Nathoo Chauhan is another excommunicate admittedly from the year 1983. Since the witness had been also excommunicated it is not unnatural that he joined the group of excommunicates or all those persons who had some axe to grind against the community. In the matter of the complaint filed by Ram Nathoo Chauhan with the police, this witness has been examined by the police, but his statement to the police made on 30-11-1984 has not been produced in evidence. It is also found from the evidence that his daughter has been excommunicated on account of some matrimonial dispute and she resides at Nava Bundar in Gujarat State. The witness it appears also resides with his daughter at Nava Bundar but, however, says not all through the year but admits having a shop at Nava Bundar. A grave doubt is cast as to whether once he and his daughter had been excommunicated he is at all residing at Goghla. That the witness has got bias for returned candidate is at once revealed from his evidence because he identifies returned candidate with kharwa community. I have made a note at page 458 of the notes of evidence which reads thus:—

"It has been found that when a question is put in cross-examination to the witness after answering the question he is making a counter reference to the respondent No. 1. Although the statement made by the witness is irrelevant and inspite of being voluntary I have recorded the same only to make this note for the purpose of appreciation of general conduct of this witness."

He mentions that when any person is excommunicated he cannot attend the meeting of kharwa community and further says that Ram Nathoo Chauhan (P.W. 13) was excommunicated at least six months before 29-11-1984. I have mentioned these facts for the purpose that if Bimji Devji had not been excommunicated on 29-11-1984 he would not have embarked upon to talk to Ram Nathoo Chauhan (P.W. 13) in the restaurant at Goghla immediately after the conclusion of the meeting of the kharwa community because that by itself is a ground for excommunication. Therefore, considering the totality of the evidence and the unnatural evidence that has come from this witness, in my view, his evidence is discredited just as he is.

104. Harilal alias Amritlal Manji Solanki is P.W. 12, who is also supposed to have attended the meeting of kharwa community, is a seaman and resident of Goghla village. He sang the same chorus song in respect of the meeting and the corrupt practices just as other witnesses sang. According to him, he came to depose in this case as a witness because one carpenter by name Lakhman Suttar who was working at his house asked him whether he could be a witness and willing to go to Goa. All this has been stated by him with a view to disassociate himself with the group or faction which is against the majority of kharwa community and from the petitioner. But it must be seen that he is one of those who swore an affidavit along with Babu Sakar Chauhan (P.W. 4), Bimji Devji Chauhan (P.W. 11), Laxmiben Ratilal (P.W. 7) and Ramji Bawa, and finally handed over the same affidavit to the aforesaid Dharamsi Somvar. The question arises is as to why he had to do that. His answer in leaving the affidavit with the aforesaid Dharamsi Somvar is again most unsatisfactory and the purpose for which that affidavit is said to have been sworn, in his own words stands defeated. Even in that affidavit, there is no reference to the meeting of the kharwa community held on 29-11-1984 or that returned candidate spoke or that the resolution was in writing and that too in the hand of the returned candidate. It is needless to mention that whatever affidavit he got sworn was a sort of a group action by the aforementioned persons and that too in the company of

Ram Nathoo Chauhan (P.W. 13). At page 518 he himself confesses that he always avoided to meet Rambhai Nathoo Chauhan (P.W. 13) because he had been already excommunicated. It is, therefore, not understood as to how this man could be associated with Rambhai Nathoo Chauhan in getting the affidavits prepared when he is trying to pose and put up a pretext that whatever affidavit that he has filed was his individual effort. Although he gave details of the meeting of 29-11-1984, he is unable to give the date or the month in which any other meeting was attended by him or what resolutions were passed in any such meetings which again cast a great shadow on his evidence. The reasonable inference, therefore, is that this witness is a tutored witness and because he belongs to the faction opposed to kharwa community, he came to tender evidence and falsely mentions that he came as a witness because of Lakhman Suttar. His entire deposition is far from happy and cannot be accepted to make it a base for setting aside an election on corrupt practices. Therefore, his evidence is nothing but tainted. This is so, in so far as the oral evidence of the persons who purportedly have attended the meeting of the kharwa community held on 29-11-1984 at Ram Mandir.

105. P. W. 6 Harilal Bijal Bamania of Godhla is a Government Primary School teacher and a member of the kharwa community. He heard the Kotval making the pronouncement of the resolution. According to him he was excommunicated in March, 1984 by the head Patel Hira Bawa and the ground on which he was excommunicated was that he was found to be talking to Sakar Nathoo Botio (P.W. 14) because Sakar Nathoo Botio had already been excommunicated earlier. The reason why he talked to Sakar Nathoo Botio was to find out from him as to what had happened in the suit filed by a Bank against his brother at Panjim Court. He had learnt that Sakar Nathoo Botio had been to Goa. But finally, in cross-examination he admits that whoever the Advocate conducting his brother's defence in that suit had been engaged by Sakar Nathoo Botio (P.W. 14). Therefore, the connection of this witness with Sakar Nathoo Botio is established. It is clear from P.W. 10 Hira Solanki that since the factional fight of 30-6-1983 Sakar Nathoo Botio had been leading the breakaway faction of the kharwa group. He, however, denied the suggestion that he has been excommunicated by the kharwa community on 1-2-1985 because he hailed to appear before the community when the labourers working at the fishing trawlers which are in the name of his brother, had complained that their wages are not being paid to them. In the matter of his knowledge that he had been cited as a witness he mentions that his brother Nathoo had a talk with one Keshavbhai who is the brother of the petitioner and a suggestion had been made that he could be a witness in this matter and, accordingly, he was cited as a witness. The interesting part of his evidence is except for the pronouncement made by the Kotval on 29-11-1984 he never heard any other pronouncement by the Kotval at any time thereby clearly suggesting that except for this occasion he had never heard the Kotval making any pronouncement of the resolution at Choro. It is common ground that the petitioner's family had monopoly business of selling petrol and diesel. The family of this witness has got fishing trawlers. The suggestion from the returned candidate that some benefits of credit facilities are given to the witness in the matter of payment of bills of diesel taken for running the fishing trawlers and, therefore, he has obliged the petitioner in giving evidence and that too in his favour therefore cannot be ruled out. The witness having heard only the resolution being pronounced at about 6.00 p.m. on 29-11-1984 and that too for the first time, never having heard anything like that before also makes his story unbelievable and unnatural. The relationship between his brother Nathoo and Keshavbhai, the brother of the petitioner being what it is at whose instance he became the witness in the present case must be held to be very cordial. His link with Sakar Nathoo Botio (P.W. 14) is also established. Therefore the witness has given false evidence cannot be ruled out. At any rate his evidence is not creditworthy.

106. Laxmiben Ratilal Ambina is the daughter of Smt. Javerben and niece of Babu Sakar Chauhan (P.W. 5). It is common ground that the house of her mother was burnt and the house of her uncle Babu Sakar Chauhan was damaged in the incident of 30-6-1983. Therefore, this witness will have bias against the kharwa community is clear from her own statement. She also says that she had implicated the returned candidate for having committed criminal offence when he led morcha on 30-6-1983 and further makes an allegation that returned candidate caught hold of her hand and assaulted her and out of fear of being further assaulted, she had to

even pass the whole night of 30th November/1st December, 1983 in the Muslim burial ground with her infant child. Next, she accepted the service of summons at the house of Ram Nathoo Chauhan (P.W. 13) in Goghla although, according to her, she had been residing at Diu. She came to accept the service of the summons all the way from Diu to Goghla because her uncle Babu Sakar Chauhan (P.W. 5) sent her a message to come to the house of Ram Nathoo Chauhan (P.W. 13). She admits that her mother Javerben had been residing at Diu since the incident of 30-6-1983 and from her conduct it also transpires that she had been residing with her mother in Diu all along. But having found she was being trapped, she corrected herself to say that she started residing in Diu a few months before July, 1985. Earlier she had also admitted that in the evening of 29th November, 1984, she had come across Ram Nathoo Chauhan at Sikoter Chora where previously she had been residing. It has come in evidence that the old house which she occupied at Sikoter Chora had already been converted into a shop, yet she makes a reference as if she had come to her own house at Sikoter Chora when she happened to meet by chance Ram Nathoo Chauhan on 29-11-1984. It is undisputed that she was one of the persons who got sworn an affidavit along with her uncle Babu Sakar Chauhan, Bimji Devji Chauhan (P.W. 11), Ramji Bawa and Harilal Manji Solanki (P.W. 12) and finally handed it over to Dharamsi Somvar and the story of this affidavit finally is never produced before any authority is common to all these witnesses. The evidence of this witness cannot be treated as an evidence coming from an independent source and the manner in which this lady was deposing, it is clear that bias for returned candidate was writ large on her face and also in her deposition. The story of her being in Sikoter Chora is difficult to be believed because she became a refugee since the riots of 30th June, 1983 took place. Besides, she admits that her children are schooling in Diu and her house has become a shop run by somebody. All these factors make her story that she started residing in Diu two months prior to July, 1985 to make believe her evidence which is false. According to me she must have been residing in Diu along with her mother Javerben since at least from 1-7-1983 after her mother's house had been gutted in fire. She admits that she had been excommunicated, but gives a fantastic reason for it. According to her because she failed to swear by Bagwat Geeta that she would only vote for the returned candidate and not for any other candidate when Hira Bawa Ratro called upon her to do so sometime before elections, she was excommunicated. This ground of excommunication is never mentioned by her in her affidavit dated 11-1-85 which she executed before the Executive Magistrate, Diu. When excommunicated on 2-1-85 the question arises as to why she would suppress this reason in her affidavit on 11-1-85. This instance by itself is enough to cast a shadow on her testimony. At any rate, it affects her credibility. It is impossible to believe that this witness who is daughter of Javerben and niece of Babu Sakar Chauhan (P.W. 5), the worst sufferer of the riots of 30-6-83 and therefore all along belonging to the breakaway faction of kharwa community should at all be contacted by head patel to make her swear by Bhagwat Geeta. She admits to have gone to the house Ram Nathoo Chauhan (P.W. 13) for the purposes of getting the affidavit sworn. At the instance of Ram Nathoo Chauhan, even her another maternal uncle's wife by name Kamlaben Bhika has sworn an affidavit along with few other persons which is at Exhibit P-8 Colly. For all these reasons, therefore, it is just not permissible to give credence to her evidence and it is impossible to hold that her evidence is acceptable. On the contrary, it must be dubbed as highly tainted evidence and on preponderance of the case she has given false evidence cannot be ruled out.

107. Insofar as P.W. 8 Lalji Bawa Baraiya, he speaks of having heard Kotval making an announcement of the meeting in the morning of 29-11-1984 and he also heard as to what transpired in the meeting because of the pronouncement made by Kotval in the evening on the said day, his house being very close to Lakaparmar Chora, Goghla. It is an admitted position that this witness was a polling agent of the petitioner and he became the polling agent at the instance of Ram Nathoo Chauhan (P.W. 13). Although at some stage he did not want to mention that he is related to Sakar Nathoo Botio, at some insistence in cross-examination he finally admitted that Sakar Nathoo Botio is the son of the brother of his father-in-law. But again he stated that he cannot say whether his father-in-law and the father of Sakar Botio are real brothers. Undisputably, he was involved in the incident of 30-6-1983 as, according to him, he was injured and had been interned in Veravel Hospital in Gujarat State. He also admits that he had been excommunicated. He is one of the prosecution witnesses in that case in which returned

candidate is involved along with scores of people in the incident of 30-6-1983. It is but natural that this man also is in the faction which is against the majority of kharwa community and, therefore, he should have bias for returned candidate and the Kharwa community. It must be seen that for a small matter like this it is not difficult to arrange some witnesses to speak that they heard Kotval making some announcement or pronouncement to paint the story as if true. Inasmuch as this witness clearly says that he implicated returned candidate in the incident and he was injured and was lying in Veravel Hospital for about a month, in ordinary course he would tender partisan evidence cannot be ruled out. He has, however, denied the suggestion that he belongs to the faction led by Sakar Nathoo Botio. I am not at all impressed by the evidence tendered by this witness and it must be held not only partisan but false.

108. Coming to the witness P. W. 13 Ram Nathoo Chauhan, he belongs to Goghla village. According to the petitioner, based on rumours that he heard about the meeting held by kharwa community he called this witness and confirmed with him. The witness having heard the version of the meeting from Babu Sakar Chauhan (P. W. 5) and Bimji Devji Chauhan (P. W. 11) gave the information to the petitioner. This witness immediately complies with the request of the petitioner and gets the aforementioned Babu Sakar Chauhan and Bimji Devji Chauhan to the petitioner, who confirmed the story of the meeting. The first question that arises is why should this witness at all take such interest even in getting Babu Sakar Chauhan and Bimji Devji Chauhan to meet the petitioner. I have to, therefore, observe that unless this witness has interest in the petitioner, why should he embark on getting the aforesaid two persons to the petitioner to talk about the meeting. I have already referred to the representation (Exh. P-8 Colly.) made by this witness on 30-11-1984 to the Civil Administrator and to the Police complaining that kharwa community has committed illegality by passing resolution and threatening members of excommunication in the event returned candidate is not voted by the kharwas. Along with that representation, he arranged to file five affidavits of (i) Smt. Sonaben Harji, (ii) Purshottam Jiva, (iii) Kamla Bhika, (iv) Kishore Kumar Kamaliya and (v) Lalji Bawa. It is in evidence, as stated by him, that he was excommunicated by the kharwa community in the year 1983 for not having acceded to the request of the returned candidate and the head patel of the community for withdrawing the complaint filed before the Police regarding the purported assault by a knife on him. It is therefore, common ground that this witness had been excommunicated on 29-11-1984 when the purported meeting of the kharwa community had been held. It must, therefore, be seen that even the passing of the resolution could not have affected him in any manner if he was not to vote for the returned candidate. A person who is really not affected by the resolution why at all should take the pains of making the representation (Exh. P-8 Colly.) and further taking the pains of collecting five different persons to get affidavits. This by itself shows his further deep interest and connection with the petitioner. His further evidence, in fact, establishes closer links with the petitioner and this is clear when he says that when the petitioner requested him to arrange for some polling agents for him on the date of the poll he told the petitioner that although he is not sure of arranging polling agents he will try and get some. But he admits that the petitioner handed over to him six forms for appointment of polling agents and, accordingly, he contacted Bimji Devji Chauhan (P.W.D. 11), Babu Sakar Chauhan, (P.W. 5) and Lalji Bawa Baraiya who agreed to be the polling agents and lastly ends up in saying that he himself became the polling agent for the petitioner. The funniest part of his story is that although he annexed five affidavits of different persons he makes a make believe story that he never knew what instructions were given by these persons, the deponents of the affidavits to Advocate Rawal to get prepared their affidavits and ends up in saying that even till the date of his examination he does not know the contents nor the nature of the affidavits of the aforesaid five persons although he filed the said affidavits along with the representation to the Civil Administrator complaining about the resolution made by the Kharwa community thereby indicating that it is an electoral offence and interference in the free exercise of casting votes. In his evidence he further admits that he himself made suggestion to the petitioner that he should indicate and examine as his witnesses in the present petition in support of the corrupt practices Babu Sakar Chauhan (P. W. 5), Bimji Devji Chauhan (P.W. 11), Laxmiben Ratilal (P.W. 7), Lalji Bawa Baraiya (P. W. 8), Purshottam Jiva, Kishore Kumar Devji Kamaliya, Smt. Sonaben Harji and Smt. Kamlaben Bhika. These latter four witnesses though listed in the roll of witnesses were however not examined. All these results

in clearly holding that this man took extra interest in the case of the petitioner in the present election dispute right from 30-11-1984 even much before the actual election was held. The unescapable conclusion, therefore, is that this witness is not an independent person and has been all along the petitioner's man and by no stretch of imagination his conduct in making the representation, in getting persons to swear affidavits, in arranging persons to meet the petitioner and further indicating the names of the several witnesses to be examined in the case and for that matter getting polling agents apart from himself becoming one cannot be held to be of a normal witness and he has to be termed as an extra-special witness of the petitioner. It is in his evidence that he also heard the Kotval pronouncing the resolution in the evening of that day when he was going for a stroll while crossing the Patel Chora. But, however, this fact does not find place in the representation (Exh. P-8 Colly.) that he filed before the Returning Officer on the very next day of the meeting. This silence, therefore, makes his story of having heard the pronouncement of the resolution at Patel Chora a false statement. It must be held that there is something seriously wrong with the story spoken to by this witness. Take for instance, his own case that he learnt about the meeting soon after that meeting ended, from Babu Sakar Chauhan (P.W. 5) and Bimji Devji Chauhan (P.W. 11). But when he filed representation on the following day, he does not make this Babu Sakar Chauhan or Bimji Devji Chauhan swear affidavits but gets affidavits of different persons, who admittedly, did not attend that meeting of the kharwa community. In ordinary course of conduct and natural sequence, it is expected that if the incident was, in fact, a reality, this witness could have got the affidavits of persons who attended the meeting rather than of those persons who professed to have heard the announcement of the meeting or pronouncement of the resolution. When a question was put to him in the cross-examination as to why he did not get the affidavits sworn of persons who attended the kharwa community meeting of 29-11-84, he was evading the answer and I made a note to this effect page 599 of the notes of evidence. At some persistence, he mentioned, after much evasion, that Purshottam Jiva and Kishore Kumar Kamaliya had mentioned to him that they had attended the meeting. It is further in evidence that when summons of this Court were to be served on the petitioner's witnesses, some witnesses at least were served at his house and that is what is spoken to by Laxmiben Ratilal (P.W. 7). Even after the election results were declared, this witness accompanied another group of five persons who had sworn affidavits before the Executive Magistrate which are collectively marked as Exh. R-15. These affidavits are by Babu Sakar Chauhan (P.W. 5), Bimji Devji Chauhan (P.W. 11), Smt. Laxmiben Ratilal (P.W. 7) and Amritlal Manji (P.W. 12). These affidavits were sworn on 11-1-1985 by them, because they had been excommunicated after the elections and it is in evidence that this witness accompanied this group. The point that arises is as to why this man should accompany them and in what manner he was connected with those affidavits. The worst part of the story as far as this witness is concerned is, according to him, even till the date his evidence was recorded by the Court, he never mentioned to the petitioner that he had made the representation annexing five affidavits dated 30-11-1984 and filed them before the Returning Officer/Civil Administrator. It remains to be seen that the petitioner when filed this petition in February 1985 refers to and relies upon the said representation dated 30-11-1984 of this witness in para 7 of the petition. This could not have happened unless this witness had made the petitioner aware of the representation. This is another falsehood from this witness. His evidence, therefore, clearly makes out an inherent mutual contradiction. All these events and circumstances, therefore, expose this witness to be so partisan that his evidence in material particulars is false and, therefore, cannot be accepted.

109. Sakarbhaj Nathoo Solanki is the next witness who comes from Vacharadev Choro. It is an admitted position that he had been excommunicated. At one time he was one of the leaders of the kharwa community of Goghla and for that matter he had even acted as Acting head Patel and even a Sarpanch. From his evidence, it is clear that he is in the faction which is opposed to the majority of the kharwa community and, according to P.W. 10 Hira Laxman Solanki, he is a leader of that breakaway faction. As mentioned earlier, it must be held that once a member of kharwa community is excommunicated or is against the majority of the said community, somehow joins hands with the petitioner and this appears to be what is going on for quite sometime. I have already made a reference that in the incident of 30-6-1983 his hut and fishing accessories at Diu were dama-

ged and his elder brother was killed. I have also further observed that once any kharwa is against the community that kharwa identifies returned candidate with the kharwa community and is against him. The story is no better insofar as this witness is concerned. The evidence of this witness must be held to be tainted for several reasons. It has come in evidence that because he has been excommunicated, he has filed a suit in the District Court at Panjim against the kharwa community for certain reliefs. In that suit, the petitioner has filed an affidavit supporting the case of this witness. At first, the witness denied that the petitioner had filed an affidavit, but later on, he admitted that the petitioner had done so. In that suit, the witness was also identified by the petitioner. It is again in evidence that this Sakar Nathoo assisted the petitioner in his election. For that matter, he addressed the public meetings convened by the petitioner in Goghla on 15th December, 1984, and even addressed another meeting organised by the petitioner at Azad Chowk at Vanakbara sometime before the election. At page 648 of the notes of evidence, after saying that he did not support any particular candidate in the last general elections, which is inherently contradictory to his own evidence, in the very next line he admits that he had applied to the District Magistrate for grant of permission for use of loudspeakers for the election propaganda of the petitioner from 15-12-1984 to 20-12-1984 and such permission had been granted. He admitted this position only because he was confronted with the order of the District Magistrate dated 14th December, 1984, granting the request for use of loudspeakers. Undisputably, this witness also arranged some witnesses for the petitioner and I have already made reference to them earlier. It is common ground that Sonaben Harji, who filed an affidavit supporting the representation of Ram Nathoo Chauhan dated 30-11-1984, which is at Exh. P-8 Colly., is the sister of this witness. This is not all. Despite his close association with the petitioner, yet he says in his evidence that he never mentioned to the petitioner that he had heard the pronouncement made by the Kotval on 29-11-1984 in the evening that such a resolution had been passed. This again becomes a highly unnatural conduct on the part of the witness who was involved in the election process of the petitioner, yet does not divulge this information to him. The total picture that emerges from his evidence is that he is having bias towards the returned candidate. He says that no sooner the petitioner filed the Election Petition challenging the election of the returned candidate after he was returned in 1980 general elections, the resolutions passed by the kharwa community sometime before that election were torn off from the book, but does not give any details. It has come in evidence that the book of resolutions from which that particular resolution was torn off was similar to the resolution passed on 29-11-1984 and is lying with the police, having been seized in the Sessions Case (incident of 30-6-1983) which is subjudice and yet for the purposes of corroboration that book is not sought from the Police and produced in this case. On this score, the evidence of this witness on that aspect has to be discarded. The result is that his evidence does not inspire confidence and, on the contrary, establishes that there is a special relationship between the petitioner and this witness and his evidence, therefore, is not only highly tainted but false and cannot be accepted in support of the case of the petitioner. On number of questions he has given evasive answers.

110. Coming to the last witness Lalji Manji Solanki (P.W.15), it must be mentioned that his evidence is to be totally rejected. He was introduced into the witness box to say that three days prior to the polling, the head Patel Hira Bawa and the returned candidate met him and told him that he should decline the office of the Presiding Officer of a polling booth in Goghla. He says that the Returning Officer of the Diu Constituency had appointed him as the Presiding Officer of a polling booth in Goghla. But somehow the returned candidate was interested that he should not be the Presiding Officer and because he declined their request, he was excommunicated on 2-1-1985.

111. Promptly, an objection was taken to this evidence being recorded on the ground that the petitioner is trying to introduce altogether fresh corrupt practice which is not led in the petition. I allowed this objection to be sustained and held that whatever evidence rendered by this witness is to be struck off as no corrupt practice could be introduced for the first time in evidence outside the petition, for admittedly, calling upon a Government servant to desist from carrying out duties would amount to an electoral offence. When this objection had been raised, the counsel mentioned that this witness was to depose only on the aspect as men-

tioned above and nothing further. But once I ordered striking off the evidence by sustaining the objection raised on behalf of the returned candidate, this witness was pursued by the petitioner to say that he also heard the pronouncement of the resolution made by the Kotval at about 6.00 to 6.30 p.m. on 29-11-1984. Obviously, this witness was not meant to depose on the aspect of his having heard the pronouncement of the Kotval. This story was introduced only after I ordered striking off his earlier evidence regarding the request to him to desist from carrying out his duties as the Presiding Officer and by which time the counsel for the petitioner had declared that the petitioner's evidence would be closed at that stage. I have mentioned in my detailed note about this at pages 679 and 680 of the notes of evidence. For this reason, it must be held that whatever evidence rendered by this witness regarding his having heard the Kotval's pronouncement is an afterthought and, therefore, not true evidence. Apart from this, it has come in evidence that he is a teacher of a Government Secondary School and by an order of the Government dated 20th April, 1985, he was transferred from Diu to Daman to teach at the Government Technical High School Centre. He clearly admits that he is transferred from Diu to Daman by the Government at the behest of the returned candidate. He then says that he has filed a Writ Petition in this Court challenging the aforesaid transfer making allegations of mala fide against returned candidate. From his evidence, it is therefore, clear that he is not an independent witness and he made allegations against the returned candidate because he believes that the transfer order was made by returned candidate because he did not accede to the request of the returned candidate to decline the office of the Presiding Officer of a polling booth at Goghla. The credibility of this witness is also in doubt because, according to him, he never mentioned to anybody that he had heard the pronouncement made by the Kotval and if this is so, how can the petitioner cite him as a witness to speak that he heard such a pronouncement made by the Kotval. His evidence, therefore, is false and not acceptable.

112. Having seen what the oral evidence is I cannot help myself but to extract a very useful quotation from the decision in *Rahim Khan v. Khurshid Ahmed*, reported in A.I.R. 1975 S.C., page 290. In para 20, it is laid down:—

"Precedents on legal propositions are useful and binding, but the variety of circumstances and peculiar features of each case cannot be identical with those in another and judgment of Courts on when and why a certain witness has been accepted or rejected can hardly serve as binding decisions".

113. Placing reliance on the authority of *Daulat Ram v. Anand Sharma* (A.I.R. 1984 S.C. 621), Shri Dhanka mentions that it has been laid down that the allegations of corrupt practice must be so clear and specific that the inference of corrupt practice will irresistibly admit if no doubt or qualm. It cannot be left to time, chance or conjecture for the Court to draw an inference by adopting an involved process of reasoning. As a logical consequence it follows that where the allegation of fraudulent practice is open to two equal possible inferences, the pleadings of corrupt practice must fail.

In order to constitute corrupt practices, the necessary particulars, statement of facts and essential ingredients must be contained in the pleadings and they are: (i) direct and detailed nature of corrupt practice as defined in the Act; (ii) details of every important particular must be stated giving the time, place, names of persons, use of words and expressions; and (iii) it must clearly appear from the allegations that the corrupt practices alleged were indulged in by the candidate himself or his authorised election agent or any other person with his express or implied consent.

114. Next he refers to the decision in *Sultan Saluddin v. Mohd Osman Shaweed*, reported in A. I. R. 1980 S. C. page 1347 where the Supreme Court has held that it is the duty of the petitioner to give full particulars and while giving such particulars they must be given with *exactitude and precision* (underlining is mine). At the same time, the Supreme Court rules that there is no such corresponding duty on the respondent to give full particulars or detailed statement of facts.

115. Mr. Dhanuka has referred to these two authorities to say that in the matter of allegations of corrupt practices of undue influence and appeal to the voters of kharwa community on grounds of caste full material facts had not been given with full particulars and whatever averments made lacked precision and exactitude. These two practices, accord-

ing to him, are liable to be dismissed and for that matter even summarily because it was never averred in the petition that: (i) returned candidate addressed that meeting of kharwa community on 29-11-1984; (ii) that the resolution requiring members of kharwa community to vote and not to vote on the basis of caste was in writing; and (iii) that that resolution was in the handwriting of the returned candidate on loose sheet of papers. And all these three material facts or particulars were brought for the first time in the oral evidence. This is undoubtedly so.

Next he mentions that it is the case of the petitioner that several of his witnesses attended the meeting of the kharwa community on 29th November, 1984. No name of any person who is supposed to have attended the alleged meeting had been disclosed. Mr. Dhanuka therefore mentions that it was clearly incumbent upon the petitioner to have given even the names of members of kharwa community who attended that meeting and having not done so a great shadow is cast on the corrupt practices alleged.

116. Apart from this I have already held that the oral version now brought in evidence despite not pleaded in the petition does not even find place in the so called documentary evidence produced by the petitioner where again all these aspects of returned candidate having addressed the meeting, that resolution was in writing and that it was written by the returned candidate himself nor the persons who attended that meeting are also missing. This being the position, the version now made in the oral evidence is very much divergent from the version made in the petition and in the documentary evidence. I must therefore hold that the oral evidence was procured.

117. The Supreme Court in *Abdul Hussain Mir v. Shamsul Huda* (A. I. R. 1975 S. C. 1612) held:—

"... When elections are challenged on grounds with a criminal taint, the benefit of doubt in testimonial matters belongs to the returned candidate ... Oral evidence ordinarily is inadequate especially if it is of indifferent quality or orally procurable."

118. For various reasons that I have indicated while commenting upon the petitioner's witnesses I have to hold that the petitioner's oral evidence is of such indifferent quality and that it is manufactured to suit the petitioner's case.

119. It is true that I have discarded the oral evidence of the petitioner, but I must say that I have not discarded that evidence merely because (i) such evidence is tainted; or (ii) that some of the witnesses were polling agents or (iii) some of the witnesses were victims of riots of 30th June, 1983; or (iv) some of the witnesses had been excommunicated, but I discarded that evidence because I held them to be false witnesses and their depositions contained inherent contradictions and infirmities and secondly they belonged to a group or faction. I have already highlighted that none of the witnesses of the petitioner had been a free person, but he belonged to a group and apart from several reasons that I have given I can mention one more. A reference has already been made by me to one Dharamsi Somvar who is supposed to have the possession of the affidavits sworn by Babu Sakar Chauhan (P.W. 4), Smt. Laxmiben Ratilal (P.W. 7), Bimji Devji Chauhan (P.W. 11) and Amritlal Manji (P.W. 12). The question arises in what way or manner this Dharamsi Somvar is connected and further interested in getting these affidavits and then keeping the affidavits with himself. Although this Dharamsi Somvar had been cited as a witness by the petitioner he was dropped. I have sufficiently discussed and held that there is a group or faction breakaway from the majority group of the kharwa community and therefore all the petitioner's witnesses and persons like Dharamsi Somvar, Kishore Kumar Devji Kamaliya, Sonaben Harji, Kamla Bhika, Purshottam Jiva and Lalji Bawa Baraiya are members of that faction and as such being opposed to kharwa community are only interested in the name of defeating kharwa community are somehow seeking to get the election of the returned candidate declared void. That they are members of the group and could be identified with leaders like Sakar Nathoo Botio (P.W. 14) and Ram Nathoo Chauhan (P.W. 13) is undisputable as also their loyalty to that group. It is in this context that it must be held that their evidence is of indifferent quality which is given deliberately to benefit only the petitioner and further with a view to somehow unsettle the returned candidate in the elections. The probative effect cannot be had from the evidence of any of the petitioner's witnesses.

120. Some comment is necessary insofar as the petitioner's evidence is concerned. The first feature of his evidence is

that he started giving evasive answers with regard to the Weekly 'Meri Awaz' and also with regard to a person called Navinchandra Gandhi. I am going to sufficiently discuss the role of petitioner vis-a-vis Farooq Karim Qazi (R.W.5) separately, but suffice here to mention that the issue of 'Meri Awaz' dated 16-12-1984 (Exh. R-13) is not only solely devoted to the petitioner and in furtherance of his election prospects but it was at his instance so that it could be circulated to the members of the kharwa community to enable them to read the statements of Hira Bawa Ratro, the head Patel when questioned by Civil Administrator mentioned that kharwa community did not pass any resolution on 29th November, 1984 and further that members of kharwa community are free to vote any candidate of their choice. Insofar as Navinchandra Gandhi is concerned, despite the petitioner started giving evasive answers and some sort of disassociation with him, finally at page 20 admitted that Navinchandra Gandhi is a partner in family business of the petitioner. Although he admitted that election manifesto of the petitioner had been printed, and had shown the name of Navinchandra Gandhi as its publisher, but however the petitioner says that the name of Navinchandra Gandhi as publisher was shown by mistake, but does not disown the election manifesto. According to R.W.5 Farooq Karim Qazi the advertisements published in 'Meri Awaz' (Exh. R-13) were given by Navinchandra Gandhi. That Navinchandra Gandhi had been his counting agent is clearly admitted by the petitioner. Yet somehow the petitioner was trying to disown him and even says that Navinchandra Gandhi was not connected with his elections. Therefore the conduct of the petitioner does not appear to be natural.

121. It is the petitioner's case that kharwa community passed a resolution prohibiting its members from giving him votes or attending his meetings or processions or assisting him in any manner in the elections except on the pain of excommunication. According to the petitioner the population of kharwa community in Goghla village is 90%. Despite this it must be seen that several members of kharwa community worked for the petitioner during election time and even became his polling agents on the day of the poll. At page 68 petitioner said:—

"I admit that every polling booth at Goghla had at least one polling agent working for me. It is possible that at some booths there might have been more than one. All polling agents of mine at Goghla booths were of kharwa community."

At page 44 of his evidence he mentions:—

"I was satisfied that the polling agents who worked for me in the last elections were my supporters."

Going by these two statements of the petitioner there are reasons to believe that if in reality that purported resolution had been passed by the kharwa community is it expected of such a large number of kharwas to have become polling agents of the petitioner, that too at various booths in Goghla itself and expose themselves to excommunication? Even on this score it could be reasonably held that there was no resolution made by the kharwa community and in this context the statement made by Hira Bawa giving the version that there was no such resolution and kharwas are free to vote, when questioned by the Returning Officer, assumes some significance. It is perhaps in the context of things that the returned candidate produced the issue of 'Meri Awaz' (Exh. R-13) to throw light on the conduct of the petitioner. The petitioner has also given a number of evasive answers. Despite his association with Sakar Nathoo Botio (P.W.14) and being a victim in the hands of kharwa community during the riots of 30th June, 1983, when stones were pelted on his petrol pump and damage sustained, the petitioner does not want to give the names of two persons who were supposed to be murdered on that day and for which a Sessions Case is pending, wherein the returned candidate is one of the accused. When a question was put to him, whether the brother of Sakar Nathoo had been murdered on 30th June, 1983, his answer is 'it may be so'. While replying to the question whether he is aware that returned candidate is charged for murder of brother of Sakar Nathoo, he mentions that he is not aware. One thing therefore clearly stands out against the petitioner that in some respects he was not giving straightforward answers and he was deliberately doing so as he could not have displayed ignorance of certain happenings of 30th June, 1983. He also displayed some type of ignorance with regard to R.W.5, Farooq Karim Qazi, the Editor of 'Meri Awaz' as also with that Weekly. It is again pertinent to note that certified copies of Index of Land (Exh.P-12 Colly.) obtained by this R.W.5 Farooq Karim Qazi from the office of the

Sub-Registrar, Una were produced by the petitioner during cross-examination of the returned candidate to confront him with those certificates. The petitioner never gave an explanation as to how he came in possession of those certificates when tendered in evidence in the cross-examination of the returned candidate and the matter came to light that these certificates were obtained by R.W.5 Farooq Karim Qazi (R.W.5), Editor of 'Meri Awaz' when latter was examined as returned candidate's witness. I have highlighted all these aspects to show the credibility of the petitioner.

122. Let me now come to the defence of the returned candidate. As mentioned earlier, in the written statement he denied that there was any meeting of the kharwa community at Ram Mandir at 11.00 a.m. on 29-11-1984 in Goghla but however, in his oral evidence he suggested his presence at Vanakbara having gone there to persuade other contestants for withdrawing their nominations at the ensuing elections.

123. It is common ground that in addition to the petitioner, the returned candidate and respondent no. 2, four more persons had filed their nominations to fight 30-Diu Assembly Constituency at the last general elections and those four persons are: (i) Ramji Hadmat Anjani, (ii) Ramji Bhagwan, (iii) M. R. Jiwani; and (iv) Jamnadas Jiva. Undisputably, 30th November, 1984, was the last date for withdrawal of the nominations and it is common ground between the parties that all these four persons withdrew their nominations on that last date.

124. In support of his case, the returned candidate has examined Ram Govind (R.W.3), Jivan Bawa Vada (R.W.4), Ramji Bhagwan (R.W.6), Pancha Parbhat Solanki (R.W.7) and Ramji Hadmat Anjani (R.W.9).

125. In his evidence, Ram Govind Dhapa (R.W.3) says that he is a resident of Bhuteshwar Colony and a tailor by profession having started his business after he retired as a Seaman. According to him, he attended the public meeting organised by the petitioner at Goghla on 15-12-84 and then says that he attended two recent meetings of kharwa community, one held on 24-11-1984 and the other on 29-11-1984 at Ram Mandir in Goghla. According to him, this meeting was in connection with some labour problems and it was neither held on 'Ekadashi' day nor 'Amavasi' day. At first the meeting had been called on 24-11-1984, but because there was no coram, the same was adjourned to 29-11-1984. On 24-11-1984, he went for the meeting for about five minutes when the head Patel Hira Bawa was speaking. But, he corrects himself and says that this was not a meeting of kharwa community, but a meeting of all communities where even some Kohlis and Muslims were present and that was in relation to women workers being made to take heavy loads on their heads and that too requiring them to work beyond certain hours. He also attended the meeting of 29-11-1984 where that problem was discussed, although he attended that meeting for a short while. This witness has been brought by the returned candidate to say three things. Firstly that there was no meeting of the kharwa community in furtherance of the election prospects of the returned candidate; secondly, it was a meeting in relation to the discussion of a labour problem relating to women workers; and lastly, returned candidate was not present at this meeting.

126. Jivan Bawa Vada (R.W.4) who is a resident of Bucharvada, Diu, says that at about 9.30 a.m. on 29-11-84 the returned candidate was met by him at the house of Rama Bawa Solanki at a place called Sankli, Diu, which is again part of Bucharvada. Returned candidate, according to him told this witness that he should accompany him to meet the three contestants, Ramji Hadmat Anjani, Ramji Bhagwan and M. R. Jiwani at Vanakbara with a view to make them withdraw their nominations. As requested, in the company of one Devji Bhaya and Raman Bawa they left in a rickshaw following returned candidate who along with Veera Pana and Devji Veera and one Satarbhai left on two motor cycles. At first they came to the house of Ramji Bhagwan (R.W.6) and on coming to his house returned candidate tried to persuade this Ramji Bhagwan to withdraw his nomination as otherwise there is a likelihood of both of them losing the elections. The returned candidate, even went on record to say that if Ramji Bhagwan does not withdraw, he himself is prepared to withdraw. The said Ramji Bhagwan, however, stated that he will convey his decision later. Taking along Ramji Bhagwan, they came to the house of Ramji Hadmat Anjani and there similar talk took place. This Ramji Hadmat Anjani also did not give his decision promising that he would convey his final decision on the subject by evening. Then, they came to the house of Jiwani, another contestant who also did not give his decision promising to convey the same later.

127. RW.6 Ramji Bhagwan Bamaniya who is a resident of Vanakbara says that he had filed nomination to contest the said elections and that he withdrew his nomination on 30th November, 1984. The reason which prompted him to withdraw his nomination was that he was persuaded by the returned candidate to do so for which reason Returned candidate had come to him on the morning of 29-11-1984 at his residence at Wadisheri, Vanakbara with others. He also gives the names of others who accompanied returned candidate and mentions that he even accompanied returned candidate to the house of Ramji Hadmat Anjani and from there to the house of Jiwani and by the time all these meetings were over it was nearly 1.00 p.m. on that day. He admits that he had allowed the returned candidate to have his election office at his shop at Bhandar at Vanakbara which is a small shop of the dimensions of 2 x 3 metres, consisting of only one room and that he even addressed a meeting of the returned candidate at Vanakbara which was held at Azad Chowk on 22-12-1984.

128. Pancha Parbhat Solanki, a retired Seaman of Goghla examined as RW.7 says that he attended the meetings held at Ram Mandir on 24-11-1984 and on 29-11-1984. He says that these meetings were called to discuss some labour problems. The nature of the labour problem, according to him, is that women workers were not to be allowed to go into deep water of the sea to carry fish to the shore from the crafts and boats and they should not be made to carry big stones on their heads to be dumped into the sea beyond 7.00 p.m. in the evening. Since there were only 25 to 30 people present at the meeting of 24-11-1984, the meeting was adjourned to 29-11-1984. He then speaks about the meeting of 29-11-1984, names various persons who were present. This witness has been naturally examined again to show that at the meeting of 29-11-1984 there was no resolution passed requiring the members of kharwa community only to vote for the returned candidate and not to vote for the petitioner except on pain of excommunication and secondly, to show that the returned candidate was not present.

129. Ramji Hadmat Anjani examined as RW.9 is a Seaman and resident of Kharwada, Vanakbara. He mentions that he was one of the candidates for the Diu Assembly Constituency at the last general elections and he withdrew his nomination form in the morning of 30-11-1984 along with Ramji Bhagwan and M. R. Jiwani. What prompted him to withdraw the nomination, according to him, is that no votes should be divided between him and the returned candidate indicating thereby that no advantage should be given to the petitioner out of the division of the votes. He says that this talk of withdrawal took place at his house because the returned candidate along with Devji Vira, Vira Punna, Sattarbhaj, Rama Bawa, Jivan Bawa, Devji Bhaya, Ramji Bhagwan and Bhika Shankar had come requesting him to withdraw his nomination form. He gives details of the talk he had with the returned candidate as to how there is a possibility of both of them losing and, therefore, one of them ought to withdraw. He then mentions that he took the decision to withdraw because returned candidate had already been a M. L. A. and, therefore, was in a better position at the ensuing elections than he himself was. He does not deny that he is a member of the Congress (I) and was, at the relevant time, an office bearer of the District Congress Committee, Diu, and so also M. R. Jiwani.

130. There is a lot of criticism of the evidence tendered by these witnesses on behalf of the petitioner and an attempt is made to say that this is got up evidence somehow to prove the alibi taken by the returned candidate that he was not at Goghla in the morning of 29-11-1984 to attend and participate at the meeting of the kharwa community on 29-11-1984 where the corrupt practices are alleged to have been committed.

131. Before, however, I come to the criticism of the evidence, Mr. Dias, the learned counsel for the petitioner, wants me to read and scan the evidence on behalf of the returned candidate with certain background and setting and in this connection he sets out several things. Firstly, according to him, it is difficult to believe that the position in which the returned candidate had been on that day, admittedly, the M.L.A. of the place and considering the nature of the problem that was sought to be discussed at Ram Mandir on 29-11-1984, being a social problem, in ordinary course it is natural that the returned candidate would not choose to remain absent and aloof from such meeting. Secondly, the meeting held on 29-11-1984 was in furtherance of his election prospects and to pass a resolution that Kharwas should not vote for the petitioner and further soliciting votes en bloc to him from kharwa community. Further, returned candidate having not set out in his pleadings that that meeting was scheduled for discussion of labour problem, the alleged

meeting of 29-11-1984 was for discussing labour problem is nothing but a hoax. He mentions that Ramji Hadmat Anjani (R.W.9) and M. R. Jiwani are admittedly both office bearers of the District Congress (I) Committee, Diu and the fact that the returned candidate has been given a Congress (I) ticket, there was no question of the returned candidate going to Vanakbara to persuade the aforementioned Ramji Hadmat Anjani and Jiwani to withdraw their nominations, for according to Mr. Dias these two persons were bound to withdraw their nominations as per the party mandate. It is lastly pointed out that RW.6 Ramji Bhagwan Bamaniya is a friend of returned candidate, the fact being he had even given his own shop to the returned candidate to set up his election office, and even addressed his public meetings at Azad Chowk which facts are enough to hold that he is a person interested in the returned candidate and, therefore, the possibility of this witness being a dummy candidate cannot be ruled out and as dummy-candidate, he was bound to withdraw the nomination and therefore the story of going to Vanakbara on 29-11-1984 is unbelievable.

132. In fairness, to Mr. Dias, the learned counsel for the petitioner, it be mentioned when he says that the fact that the returned candidate having taken the alibi or his defence that he was not at Goghla when not proved by the returned candidate that by itself would not make the petitioner's case truthful or acceptable by the Court, for it will still remain for the petitioner to prove his case to the hilt, insofar as the corrupt practices are concerned. But he, however, qualifies that the standard which was otherwise required may not be insisted upon.

133. Coming now to the submissions of Mr. Dhanuka, the learned counsel for the returned candidate, he mentions that while scanning the evidence on behalf of the returned candidate in support of his defence, the standard applicable for scanning the evidence on behalf of the petitioner to prove corrupt practices is not one and the same, but it is much lesser when it comes to the case of the defence. For that matter, he also points out that there is not even a corresponding duty on the returned candidate even to give full particulars or detailed statements of facts as required for the petitioner to plead everything when allegations of corrupt practices are averred. He next mentions that in his written statement the returned candidate has denied that he was present in Goghla. He has further denied that there was any meeting of kharwa community or that he attended that meeting or that any resolution was passed. Merely because he says that he was at Vanakbara does not bring about any special onus on the returned candidate and if he proves that he was not present at Ram Mandir at 11.00 a.m. on 29-11-1984 and that no resolution was passed in his presence, the petition ought to fail.

134. Let me bifurcate the defence evidence, one in respect of the witnesses speaking about the presence of returned candidate at Vanakbara and the other in respect of the witnesses who attended the meeting at Ram Mandir on 24-11-1984 and on 29-11-1984.

135. Coming to the witnesses Jivan Bawa Vada (RW. 4), Ramji Bhagwan (RW. 6) and Ramji Hadmat Anjani (RW. 9) who speak of the presence of returned candidate at Vanakbara right from 9.30 a.m. till 1.00 p.m. on 29th November, 1984, I am unable to find that there are infirmities in their evidence. It may be true that there are some discrepancies here and there. But it cannot be held that these are people who are under the control of the returned candidate or they spoke lies with a view to save the returned candidate. According to Mr. Dias, M.R. Jiwani and Ramji Hadmat Anjani (RW. 9) being the office bearers of the District Congress (I) Committee, Diu, were bound to withdraw their nominations because the Congress (I) party had given ticket to the returned candidate to contest 30-Diu Assembly Constituency and, therefore, there was no need for the returned candidate to have gone to them begging for their withdrawal and, therefore, this story is got up only to make the returned candidate come out of Goghla to show his absence at Ram Mandir and non-participation at the resolution of the kharwa community on 29-11-1984.

136. The argument at the first sight may appear to be attractive, but nothing can be ruled out that even party members at the last minute with a view to contest elections break away from the party and remain in the fray. There is evidence coming from Ramji Hadmat Anjani (RW. 9) that he had not attended the Diu District Congress Committee meeting held on 26-11-1984. For that matter M. R. Jiwani had also not attended the said meeting to give approval for the candidature of the returned candidate. It is further in evidence that the returned candidate got the approval from

the party when Mrs. Sulochana Katkar, the President of the Goa, Daman and Diu Pradesh Congress (I) Committee communicated to the returned candidate that he has been given a party ticket and selected to contest on Congress (I) ticket for 30-Diu Assembly Constituency and that the communication had been received only on 27-11-1984. Viewed in this context, I am unable to accept the contention of the petitioner that for the reasons mentioned by him the returned candidate must not have gone to Vanakbara in the morning of 29-11-1984 to request and persuade the other contestants to withdraw their nominations. There is nothing before me in evidence to suggest that Ramji Hadmat Anjani (RW. 9) and M. R. Jaiwani are persons who are, in any manner, dependent upon the returned candidate or under his influence and on the contrary, I can safely hold that they are free and independent persons. Insofar as the evidence of Ramji Bhagwan Bamaniya is concerned, it is common ground that he does not belong to Congress (I) party nor is a member of any other party. He candidly says that after withdrawing his nomination he even allowed returned candidate to have his election office in his shop at Bunder at Diu and even addressed a meeting held at Azad Chowk, Vanakbara, on 22-12-1984. Even assuming that he is a partisan witness and for that matter exercising all caution, I may hold that his evidence about the presence of the returned candidate in Vanakbara between 10.30 to 1.00 p.m. cannot be brushed aside. The details spoken to by Jivan Bawa Vada (RW. 7) as to how the returned candidate came to him accompanied by several others and how he accompanied the returned candidate and others in various places of the contestants has also remained unassailable despite cross-examination and, therefore, his evidence also cannot be said to be tainted. I accept the proposition made by Mr. Dhanuka, learned counsel for the returned candidate that the standard of proof required from the returned candidate to prove his defence is not of that standard that the petitioner is required to prove the charges with criminal taint. I would, therefore, hold that the returned candidate was pursuing his mission to make the three contestants to withdraw from the fray is held to be proved. I have to therefore hold that returned candidate was at Vanakbara, Diu on the morning and forenoon of 29-11-1984 and could not be present at Goghla much less at Ram Mandir.

137. The criticism of the witnesses Ram Govind (RW. 3) and Pancha Parbhat Solanki (RW. 7) on behalf of the petitioner is not unjustified. On reading the evidence of Ram Govind and Pancha Parbhat Solanki, a doubt is cast on their testimony. The manner in which Ram Govind speaks of having attended the meeting on 24-11-1984 for five minutes and for some odd minutes on 29-11-1984 shows his approach to the two meetings how casual it is. On reading his evidence, one is left to think that this man had no interest at all in the labour problem and, therefore, why should he attend such a meeting at all. Something could also be said about Pancha Parbhat Solanki. Besides their evidence is mutually conflicting. The evidence of Pancha Parbhat Solanki also does not inspire confidence. It is, therefore, difficult to hold, based on the evidence of these two persons, that they had attended the meetings as alleged by them.

138. I must hold that merely because returned candidate by the evidence of R.W. 3 Ram Govind and RW. 7 Pancha Parbhat Solanki has not been able to prove that they attended the meeting on 29-11-1984, it does not and cannot mean that the petitioner has gained any advantage in his favour or that his burden has become any lighter and it is still for him to prove the corrupt practices alleged. That burden of the petitioner never shifted upon the returned candidate.

139. Mr. Dhanuka rightly placed reliance in the decision of the Supreme Court in *D. Venkata Reddy v. R. Sultan*, reported in A.I.R. 1976 S.C., page 1599 where it is laid down that it is well settled that the onus lies heavily on the election petitioner to make out a strong case for setting aside an election. It is further held that in our country, election is fairly costly and expensive venture and the Representation of People Act has provided sufficient safeguards to make the elections fair and free. In these circumstances therefore, the election results cannot be lightly brushed aside in election disputes. This authority also in terms lays down that the evidence must not come from tainted or interested sources and if there is any partisan evidence, a very strong case must be made out.

140. Next he referred to the decision of *N. C. Zehang v. Aju Newmal*, reported in A.I.R. 1981 S.C., page 8, which according to him lays down that a charge under Section 123 of the Act must be proved by clear and cogent evidence as a charge for a criminal offence and it is not open to

the Court to hold that a charge of corrupt practice is proved merely on a preponderance of probabilities but it must be satisfied that there is evidence to prove the charge beyond a reasonable doubt.

141. Mr. Dhanuka rightly submitted that even if a particular defence is taken by the returned candidate who is respondent in the petition and if such defence fails, yet it is for the election petitioner to prove the allegations of corrupt practices and the onus is always on him. Inasmuch as the trial in an election petition is held to be quasi criminal equated with a criminal trial, the standard of proof required is as required for conviction in a criminal trial. For this proposition Mr. Dhanuka relied upon the decision of *Ravishankar v. State of Gujarat*, reported in A.I.R. 1966, Gujarat, page 293.

142. In this case it must be held that the onus never shifted on the returned candidate and the petitioner did not prove his case and at any rate beyond reasonable doubt and further he never made such a strong case even if tainted and partisan evidence is otherwise liable to be accepted.

143. However, a special treatment is required to be given to Farooq Karim Qazi (RW. 5). This person has been examined as returned candidate's witness. Admittedly, he is the Editor and Publisher of a Weekly called "Meri Awaz" (Exh. R-13) which is published in Gujarati. It is in evidence that this Weekly is not being published as a regular weekly and it appears that its publication depends upon the advertisements collected by this Editor. I have already made a reference that in the issue of 'Meri Awaz' dated 16th December, 1984 (Exh. R-13) a report was published to the effect that Head Patel Hira Bawa when questioned by the Civil Administrator mentioned that kharwa community has not passed any resolution requiring the members of that community to give votes to the returned candidate and not to give votes to the petitioner on the basis of caste and community. He was further quoted to have said that members of kharwa community are free to vote for any candidate of their choice and according to their conscience. This report has been published at page 2 of this issue of 'Meri Awaz'. During the course of the cross-examination of the petitioner, this issue was shown to him and he was questioned at length on this aspect. Various suggestions were put to him and to list a few of them would be advantageous for the better appreciation of the entire matter. A suggestion was made that the circulation of this Weekly was more beneficial to the petitioner than to the returned candidate because the people of Goghla on reading this issue would consider that there is no such resolution and since head patel has given clearance to vote for any candidate of their choice. Therefore, the issues of this Weekly 'Meri Awaz' were largely distributed by the petitioner through his agents in the village of Goghla. Another suggestion was made that this particular issue was got published by the petitioner himself by giving advertisements to the Editor (RW. 7) so as to enable the distribution of this Weekly in Goghla village which may eventually benefit the petitioner. The petitioner, however, has denied all these suggestions and for that matter has even gone to the extent of saying that whatever advertisements found in the issue of 'Meri Awaz' (Exh. R. 13) had never been given by him and further he never paid for it. In other words, the petitioner was interested in somehow disassociating himself with the issue of 'Meri Awaz' dated 16-12-1984 and also the witness Farooq Karim Qazi (RW. 5).

144. A number of things speak for themselves when this issue is scanned and read. It may, however, be seen that this entire issue of 'Meri Awaz' (Exh. R-13) is devoted to the petitioner vis-a-vis his election. News items and reports that exist are to benefit him. Advertisements are in furtherance of his election prospects. On right top of the first page in a box item the petitioner's election symbol 'pot' is mentioned in which votes are solicited and it says that Mr. Narayan Shrinivass Fugro is an independent candidate for Diu Assembly Constituency to whom precious votes be given. The remaining part of the first page is devoted to a writeup under the heading "Winning of an independent candidate Shri Narayan Shrinivass Fugro in Diu in the election of Goa Assembly is certain". A photograph of the petitioner is also given in the middle. At page 2 is the item relating to the purported statement of Hira Bawa, Head Patel to which I have already made a reference. There is another news item that the petitioner has inaugurated his election office at Goghla where well-known Hindu-Muslim businessmen, citizens and members

of kharwa community were present. There is still one more news item saying that the inauguration of election office has already taken place on 15-12-1984 and a large number of people from Goghla were present in big number and further that the petitioner and other members of kharwa community and Hindu-Muslim brothers gathered for the inauguration of this office. Page 3 top part say about 1/5th is devoted to a news item saying that the returned candidate left the meeting and went away and in the remaining 4/5th of the page a large advertisement in furtherance of the election prospects of the petitioner is published along with his photograph again. Insofar as the fourth page (last) is concerned, there is again writup coming from page 1. Farooq Karim Qazi (RW.5) states that the petitioner did not give him these advertisements nor he has been finally paid for them by anyone. He, however, prepared reports which were published because, according to him, as a press-man he was bound to report what was expected of him. According to him, these advertisements were brought in and he was asked to publish them by one Navalbhai Thakkar who works for him on commission basis for getting advertisements. Although after publication of these advertisements the witness tried to get money from Navalbhai, the latter stated his inability to pay for them on the ground that these advertisements had been given to him not by the petitioner but by one Navinchandra Gandhi, who is repudiating to pay.

145. From the conduct of the witness, it is very clear that this witness was trying to disassociate himself from the petitioner and putting upon that garb. The fact, however, remains that Navinchandra Gandhi had been even the counting agent of the petitioner and publisher of his election manifesto and the petitioner himself admits in his evidence at page 20 that he is a partner in his family business. It is, therefore, impossible to believe what this witness says in the matter of his disassociation with the petitioner. It is also impossible to believe that 'Meri Awaz' a Weekly which is not at all regularly coming out, is published at random depending upon the finances and particularly Exh. R-13 i.e. issue dated 16-12-1984 being almost entirely devoted to the petitioner in furtherance of his election campaign and in a way to belittle the returned candidate is not the doing of the petitioner or that its publication was not at his sole instance. At page 3 such a big advertisement with a photograph is the clear proof besides writups at pages 1, 2 and 4, all in favour of the petitioner. Even other news items of opening of the election office at Goghla clearly lends support to this conclusion.

146. This is not all. During the course of the cross-examination of the returned candidate, which was in early January 1986, the petitioner produced four certified copies of extracts of Index of Lands relating to different lands situated at Una of Gujarat State. These four Index of Lands being certified copies given by the office of the Sub-Registrar, Una, are naturally to show that the returned candidate or his wife own these lands. These certified copies are Exh. R-12 Colly. found at pages 761(a), 761(b), 761(c) and 761(d) were all obtained by this Farooq Karim Qazi (R.W.5) in his name and even the stamp papers on which they are extracted bear his signatures being the purchaser thereof. These signatures are duly identified by the witness. The question that arises is why these certified copies were obtained by Farooq Karim Qazi and how they found their way into the hands of the petitioner to produce them during the cross-examination of the returned candidate even before Farooq Karim Qazi was examined as a defence witness as R.W.5 on 22-2-1986, much after the documents (Exh. R-12 Colly.) were tendered. When this Farooq Karim Qazi was confronted with a question in the cross-examination as to how certified copies of Index of Lands obtained by him came into the hands of the petitioner, he was unable to offer any explanation and when he was further confronted with the question and suggestion that he obtained these documents to pass over the same to the petitioner, he denied the same and stated that he had obtained them with a view to expose the returned candidate that he has also started buying lands indicating thereby that the returned candidate was amassing wealth. The whole evidence of this Qazi on all major points, therefore, is so partisan that it is highly unsafe and unreliable. From his conduct in the witness box and the story of the documents at Exh. R-12 Colly. gave scope to the Court to permit the returned candidate to put questions to him in the nature of cross-examination although he entered the witness box as a witness for the returned candidate. His evidence is also highly unnatural. It is clear that he is petitioner's man and he was interested in tendering evidence against the returned candidate.

147. There is one more factor which makes his evidence discredited. He mentioned in his evidence that the uncle of

the returned candidate Veera Ranchod called him in the evening of 28-11-1984 at his business premises and invited him to attend the kharwa community meeting scheduled for the next day at 11.00 a.m. at Ram Mandir. He says, accordingly, he came to attend that meeting and before the start of the meeting, he met the returned candidate. But, however, he could not go to the Ram Mandir because no member other than kharwa community is allowed to be present at the meeting of kharwas. The version of Farooq Karim Qazi that he is not permitted to attend the meeting of kharwa community is no doubt correct, but then his statement that Veera Ranchod invited him to attend that meeting is false because obviously he could not attend that meeting and Veera Ranchod could not have invited him. He deliberately made up that story with a view to somehow corroborate the petitioner's case that there was a meeting of kharwa community on 29-11-1984 at Ram Mandir and by saying that he shook hands with the returned candidate before the start of the meeting. He is seeking to make believe that the returned candidate was present for that meeting. The petitioner having denied the admission of the issue of 'Meri Awaz' dated 16-12-84 (Exh. R. 13) into evidence, the returned candidate was perforced to examine this witness although he is petitioner's man to technically prove that Exh. R-13. In the circumstances, whatever answers favourable to the petitioner given by this witness in cross-examination by the counsel for the petitioner, cannot be allowed to be availed of by the petitioner to his advantage. This evidence, therefore, cannot be accepted on the ground that he is highly interested in the petitioner. Needless to say that the petitioner was catering to his needs and he was catering to the petitioner's demands.

147A. For all these reasons from the evidence on record, both documentary and oral, it is not proved that the kharwa community held its meeting at Ram Mandir, Goghla on 29-11-84 at which purported resolution was made.

148. Based on the averments in para 5(4) of the petition, the issues framed are:—

"5) Whether the petitioner proves that even if the petitioner does not prove the corrupt practices committed by respondent No. 1 and said Hira Bawa with his consent, the election of respondent No. 1 has been materially affected by the said corrupt practices which were committed in the interest of respondent No. 1 by his agent?

6) Whether the swing of the majority of votes in favour of the respondent No. 1 in Goghla village is entirely referable to corrupt practices?"

In this connection it must be seen that these two issues are interconnected with issues Nos. (2), (3) and (4). Once I have held that the petitioner has failed to prove the corrupt practice of bribery as also the corrupt practices of undue influence and appeal to the members of the kharwa community to vote on the basis of caste for very many reasons already set out above, it is just not possible to hold that the election of the returned candidate has been materially affected by the aforementioned corrupt practices, for it cannot be held that they were committed in his interest by his agent Hira Bawa Ratro.

149. There is no evidence adduced by the petitioner to even remotely prove that the conduct of Hira Bawa Ratro during election time was that of an agent of the returned candidate. The only thing Mr. Dias, the learned counsel for the petitioner, has been able to point out is that Hira Bawa Ratro had been the proposer having signed the nomination form filed by the returned candidate at the last general elections and secondly, suggestions were put to the returned candidate that Hira Bawa Ratro was moving with him from door-to-door of the voters and lastly that he addressed the meeting at Ram Mandir on 29-11-1984 and the meeting at Bunder, Vanakbara, in the evening of 23rd December, 1984.

150. Mr. Dhanuka, the learned counsel for the returned candidate, is quite justified in saying that these three aspects of the matter by no stretch of imagination can make Hira Bawa Ratro the agent of the returned candidate. It must be seen that merely because Hira Bawa Ratro signed on the nomination form as the proposer of the returned candidate, it cannot be held that he was acting as the agent of the returned candidate. The election law requires that a voter must propose a candidate and if on the basis of such requirement of the law the Head Patel of the community signs as a proposer, it cannot be accepted that he was acting as his agent. Coming to the second aspect that Hira Bawa Ratro moved with the returned candidate soliciting votes from door-to-door of the voters, there is no evidence at all forthcoming in this behalf. Whatever suggestions were made to the returned candidate were without foundation and, there-

fore, it can be straightaway held that there is nothing to support that Hira Bawa Ratro moved with the returned candidate soliciting votes or that he assisted him in any other way in his election campaign and in the process of election. Undisputably, one Dr. Kapadia was the election agent of the returned candidate and he has named several persons who assisted him in his campaign. Besides, the returned candidate has flatly denied that Hira Bawa Ratro, in any manner, assisted him in the elections.

151. Insofar as the meetings addressed by Hira Bawa Ratro, I have already rendered findings that there was no meeting held at Vanakbara in the election office on 23-12-1984 and insofar as the meeting of 29-11-1984 at Ram Mandir at Goghla, there is no proof that such a meeting passed any resolution or that any appeal was made to the members of the kharwa community to vote for the returned candidate on the ground of caste and community and not to vote for the petitioner. It is, therefore, not possible to hold that the election of the returned candidate has been materially affected because it is referable to the corrupt practices alleged in paras 5(1), 5(2) and 5(3) and that such corrupt practices were committed in the interest of the returned candidate by his so-called agent.

152. Coming to Issue No. (6), it is impossible to hold that the swing of the majority of the votes in favour of returned candidate in Goghla village is entirely referable to the alleged corrupt practices firstly because I have already rendered findings that the alleged corrupt practices have not been proved. The other aspect is that I have already adverted sufficiently that the village of Goghla never supported the petitioner in any of the earlier elections right from the year 1967. I have already mentioned figures and shown how the petitioner has no following in the village of Goghla and I have no reasons to believe that because the returned candidate got 3148 votes from Goghla as against the petitioner who polled 558 votes, there is any occasion to hold that the swing of the majority of the votes in favour of the returned candidate was referable to the alleged corrupt practices.

153. Summing up: By my Order dated 2nd July, 1985 (Exh. 24) I decided the preliminary objection against the returned candidate and held that the objection is not maintainable and the petition is not liable to be dismissed for want of proper verification and directed the petitioner to file a fresh affidavit disclosing sources of his information.

As to the allegations of corrupt practice of bribery regarding the promise made by the returned candidate to the voters that he would construct sheds costing Rs. 5000/- each for storing mechanised boats and further give a barrel of kerosene costing Rs. 500/- each; though I held that this corrupt practice is liable to be dismissed summarily, yet I decided the same on merits as not having been proved by the petitioner. My findings are that no such meeting was proved to have been held by the returned candidate on the evening

of 23rd December, 1984 at his election office at Bundar, Vanakbara, Diu, where alleged practices are said to have been made.

In the matter of corrupt practices of undue influence and appeal to the voters of kharwa community to vote for the returned candidate and not to vote for the petitioner on the grounds of caste and community, I held that the petitioner failed to prove these two corrupt practices also. My findings are that the petitioner did not prove that the kharwa community held its meeting at Ram Mandir on 29th November, 1984 at which a resolution was passed requiring all members of kharwa community to vote only for the returned candidate and not to vote for the petitioner, not to take part in the meetings and processions organised by the petitioner and that if any member of the kharwa community flouted the resolution would be treated as an offender and excommunicated. Once I held that no such meeting was proved to have been held and no resolution was proved to have been passed the ground of appeal to the voters on the basis of caste and community cannot survive. I have also accepted the alibi of the returned candidate that he was not at Goghla on the morning and forenoon of 29th November, 1984 so as to have attended any meeting there and further that he was at Vanakbara, Diu.

Once I held that the corrupt practices of (1) bribery, (2) undue influence, and (3) appeal in the name of caste and community are not proved, I have negatived Issues No. 2, 3 and 4.

I have already held that the alleged corrupt practices are not proved to have been committed by the returned candidate and the said Hira Bawa Ratro, much less with his consent. I have also held that Hira Bawa Ratro is not proved to be the agent of the returned candidate. Hence I will have to hold that the election of the returned candidate is not materially affected by the corrupt practices, which are alleged to have been committed, in his interest, by Hira Bawa Ratro as his agent or by any other individual for that matter. These observations negative Issue No. 5.

I have also held that the swing of the majority of votes in favour of the returned candidate in Goghla village is not entirely or otherwise referable to corrupt practices alleged. Hence Issue No. 6 is answered in the negative.

Once I have negatived Issues No. 2, 3, 4, 5 and 6 and held them as not proved by the petitioner, the question of granting relief in terms of Issue No. 7 does not arise.

154. For the various reasons made in my judgment I must uphold the election of the returned candidate to 30-Diu Assembly Constituency to be in order. The petitioner therefore is not entitled to a declaration that he has been elected from that Constituency. The petition therefore fails.

155. The Election Petition is dismissed and the petitioner is directed to pay costs of Rs. 2000/- to the returned candidate.